88-609

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

NO. 87-____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

STATE OF ARIZONA,

Petitioner,

-vs-

CONRAD MARION FLINT,

Respondent,

ON WRIT OF CERTIORARI TO THE
ARIZONA COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

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102 pp

QUESTION PRESENTED

Does the State of Arizona have concurrent jurisdiction with the federal government over a criminal case arising on land leased by a state entity from the Navajo Indians where the defendant is a non-Indian but the victims of the crimes are Indians?

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OPINION BELOW

The Arizona Court of Appeals' opinion, relying on the dicta of this Court in Williams v. United States, 327 U.S. 711 (1946), held that the State of Arizona lacked jurisdiction to prosecute a non-Indian who committed crimes against Indians on reservation land. State v. Flint, ____Ariz.____, 756 P.2d 324 (Ct.App. 1988).

JUDGMENT SOUGHT TO BE REVIEWED

Petition for writ of certiorari to the Arizona Court of Appeals.

The Arizona Attorney General on behalf of the State of Arizona prays that a writ of certiorari issue to review the judgment of the Arizona Court of Appeals entered on January 19, 1988, and the Petition for Review denied by the Arizona Supreme Court on July 13, 1988. (Appendices A and B.)

STATEMENT OF JURISDICTION

Conrad Marion Flint was charged by indictment in Navajo County, Arizona, with four counts of oral sexual contact with a minor and four counts of commercial sexual exploitation of a minor. In a separate indictment, Flint was charged with six counts of oral sexual contact with a minor and two counts of commercial sexual exploitation of a minor. The Navajo County Superior Court judge dismissed the indictments holding that the federal government, and not the State of Arizona, had jurisdiction to prosecute Flint.

The state filed a timely notice of appeal challenging the superior court's ruling. On January 19, 1988, the Arizona Court of Appeals affirmed the decision of the trial court. On July 13, 1988, the Arizona Supreme Court denied the state's

petition for review. No rehearing was requested as motions for rehearing are not permitted for a denial of a petition for review. This petition for a writ of certiorari was timely filed within 60 days of the Arizona Supreme Court's order denying the state's petition for review. This Court returned the petition as the appendix was not properly printed. The corrected petition is timely filed within 21 days of receipt of the returned petition. Petitioner invokes this Court's jurisdiction under U.S. Const. art. III, § 2, 28 U.S.C. § 1254(1), and Supreme Court Rule 20.1.

CONSTITUTIONAL PROVISIONS,

STATUTES, AND TREATIES INVOLVED

The pertinent part of 18 U.S.C. § 13:

> Whoever within or upon any of the places now existing or hereafter reserved or acquired as provided in section 7 of this title, is guilty of any act or omission which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State, Territory, Possession, or District in which such place is situated, by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment.

The pertinent part of 18 U.S.C. § 1151:

> . . . "Indian country" . . . means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not

been extinguished, including rights-of-way running through the same.

The pertinent part of 18 U.S.C. § 1152:

> Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country.
>
> This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively.

The pertinent part of 18 U.S.C. § 1161:

> (a) Each of the States or Territories listed in the following table shall have jurisdiction over offenses committed by or against Indians . . . .
>
> . . . .
>
> (c) The provisions of sections 1152 and 1153 of this chapter shall not be applicable within the areas

> of Indian country listed in subsection (a) of this section . . . .

The pertinent part of 18 U.S.C. § 3243:

> Jurisdiction is conferred on the State of Kansas over offenses committed by or against Indians on Indian reservations . . . . This section shall not deprive the courts of the United States of jurisdiction over offenses defined by the laws of the United States committed by or against Indians on Indian reservations.

The pertinent part of 25 U.S.C. § 1321:

> The consent of the United States is hereby given to any State not having jurisdiction over criminal offenses committed by or against Indians in the areas of Indian country situated within such State . . . .

The pertinent part of the treaty between the United States of America and the Navajo Tribe of Indians (Proclaimed August 12, 1868):

> If bad men among the whites, or among other people subject to the authority of the United States, shall commit any wrong upon the person or property of the Indians, the United States will, upon proof made to the agent and forwarded to the Commissioner of Indian Affairs

at Washington city, proceed at once to cause the offender to be arrested and punished according to the laws of the United States, and also to reimburse the injured persons for the loss sustained.

If bad men among the Indians shall commit a wrong or depredation upon the person or property of any one, white, black, or Indian, subject to the authority of the United States and at peace therewith, the Navajo tribe agree that they will, on proof made to their agent, and on notice by him, deliver up the wrongdoer to the United States, to be tried and punished according to its law; and in case they wilfully refuse to do so, the person injured shall be reimbursed for his loss from the annuities or other moneyes due or to become due to them under this treaty, or any others that may be made with the United States. And the President may prescribe such rules and regulations for ascertaining damages under this article as in his judgement may be proper; but no such damage shall be adjusted and paid until examined and passed upon by the Commissioner of Indian Affairs, and no one sustaining loss whilst violating, or because of his violating, the provisions of this treaty or the laws of the United States, shall be reimbursed therefor.

(Entire Treaty contained in Appendix D.)

STATEMENT OF FACTS

The facts of this case are undisputed. Conrad Flint, the defendant, is not an Indian. Flint is a licensed school teacher with the State of Arizona and was, at all relevant times, a teacher with the Kayenta School District. The Kayenta School District is authorized and funded by the State of Arizona and her governmental entities. The sites of all of the alleged crimes took place in Flint's apartment. Flint's apartment is located on property leased by the Kayenta School District from the Navajo Nation to provide education for Indian children.

Flint met and developed contacts with various boys (Indians) through his position as a fifth grade teacher with the Kayenta School system. Eventually, Flint would invite the boys to his

apartment, where he would pay them money so that he could videotape them without their clothes on. Flint would then engage in various sexual acts with the children. The state seized, pursuant to a warranted search of Flint's apartment, 2,000 to 3,000 photographs and slides and 29 VHS tapes depicting various sexual encounters between Flint and his victims.

On May 14, 1986, a Navajo County Grand Jury indicted Flint on six counts of sexual conduct with a minor and two counts of sexual exploitation of a minor. On June 18, 1986, a different Navajo County Grand Jury indicted Flint on four additional counts of sexual conduct with a minor and sexual exploitation of a minor.

On August 7, 1986, the trial court dismissed the charges, holding that the

federal government had exclusive jurisdiction over crimes committed against Indians by non-Indians on Indian reservations and thus the state had no jurisdiction to try the charges. (Appendix C, Minute Entry of Aug. 7, 1986, at 1-11.) The trial court thereafter ordered that Flint be released from state custody. (Id.)

On August 12, 1986, the state filed a timely notice of appeal from the trial court's dismissal of the state's prosecution. On January 19, 1988, the Arizona Court of Appeals affirmed the decision of the trial court. [Appendix A, State v. Flint, ____Ariz.____, 756 P.2d 324 (Ct.App. 1988).] The state filed a timely petition for review with the Arizona Supreme Court. On July 13, 1988, the Arizona Supreme Court denied the petition for review without comment. (Appendix B, Order dated July 13, 1988.)

REASONS FOR GRANTING THE WRIT

A state, by its admission into the union of the United States "has acquired criminal jurisdiction over its own citizens and other white persons throughout the whole of the territory within its limits." United States v. McBratney, 104 U.S. 621, 624 (1882) (emphasis added); Draper v. United States, 164 U.S. 240 (1896). Indian reservations that lie within the state's boundaries are not the "sole and exclusive jurisdiction" of the federal government unless expressly so designated by the United States Congress. United States v. McBratney, supra, 104 U.S. at 623-24; Blue Jacket v. Board of Commissioners of the County of Johnson, (Kansas Indian Case), 72 U.S. (5 Wall.)

667 (1867).[1] Arizona asserts that the trial court erred in finding lack of jurisdiction and dismissing the instant charges; and that the Arizona Court of Appeals erroneously applied the law as set forth by this Court in McBratney in affirming the trial court.

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1. The Arizona Court of Appeals stated that the grant of jurisdiction to Kansas indicated that the federal jurisdiction was exclusive. State v. Flint, Appendix A at 13. The court failed to note why the jurisdiction was needed. The Kansas treaty specifically excluded state jurisdiction. Blue Jacket v. Board of Commissioners, supra. After this Court held that the treaties and acts of Congress excluded crimes committed against Kansas Indians from the jurisdiction of the State of Kansas, the United States Congress enacted legislation conferring on the State of Kansas concurrent jurisdiction over criminal acts committed by non-Indians against Indians. 18 U.S.C. § 3243. By conferring concurrent criminal jurisdiction on Kansas, Congress did nothing more than place Kansas in the same position as that enjoyed by all sister states.

Generally, there are only two bases for denying state jurisdiction over conduct committed in Indian country but within the territorial borders of the state: one is tribal sovereignty and the other is federal preemption. White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 142-43 (1980); Rice v. Rehner, 463 U.S. 713, 718-19 (1983). Neither ground is sufficient to bar Arizona jurisdiction in the case on review.

In Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 561 (1832), Chief Justice Marshall wrote that the Cherokee Nation "is a distinct community, occupying its own territory, with boundaries accurately described, in which . . . [state laws] can have no force . . . but . . . in conformity with treaties, and acts of Congress." This concept of impenetrable reservation borders has not withstood the

tests of time. As outlined in Rice v. Rehner, 463 U.S. at 718-20, state law has repeatedly been allowed to penetrate reservation borders. Indeed, the absolute limits of the concept were breached in the context of criminal law in the century-old McBratney case. The core interest which the doctrine is meant to protect is the Indians' right to self-government. As recently stated in Washington v. Confederated Bands and Tribes of Yakima Indian Nation, 439 U.S. 463 (1979):

> [S]tate law reaches within the exterior boundaries of an Indian reservation only if it would not infringe "on the right of reservation Indians to make their own laws and be ruled by them."

439 U.S. at 470, citing Williams v. Lee, 358 U.S. 217, 219-20 (1959). Notions of Indian sovereignty have been adjusted, however, to take account of the state's legitimate interest in the affairs of

non-Indians. McClanahan v. Arizona State Tax Commission, 411 U.S. 164, 171 (1973). The principle of tribal self-government is surely not offended by a state prosecuting a non-Indian, who, by virtue of Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978), is not subject to tribal criminal jurisdiction.

The second possible objection to state jurisdiction over this case is the doctrine of federal preemption. This doctrine is similar to, but differs from, federal preemption in the state-federal context. Rice v. Rehner, 463 U.S. at 718, citing White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143 (1980). For the preemption test to preclude state jurisdiction, it is necessary to find that a balance of federal, Indian, and state interests requires sacrifice of the latter. Rice v. Rehner, 463 U.S. at

720. As noted above, a tribe can hardly complain of the state's assumption of jurisdiction over one who is beyond its own power. Likewise, the federal (and tribal) interests in preserving peace in Indian country are not encroached upon by a state undertaking prosecution. The federal government retains concurrent jurisdiction so that it may go forward if it believes its interests, or those of its tribal wards, have not been satisfactorily vindicated in the prior state proceedings. Cf. Abbate v. United States, 359 U.S. 187 (1959).

Arizona's interest in maintaining law and order within its borders is obvious and compelling. In the instant case, the defendant is licensed by the State of Arizona to teach school in any public school throughout the state. Likewise, defendant is employed as a school teacher

by Navajo County to teach Indian children, an obligation statutorily imposed on the county. Defendant gained contact with his victims through his licensed employment and actually carried out the sexual assaults on property leased by a Navajo County School Board from the Navajo Nation. The state interest in this case is clearly paramount to all other interests. While a strong case can be made for immunizing Indian defendants from state processes, see United States v. Kagama, 118 U.S. 375, 384 (1886), the same cannot be said for forbidding the state to act against non-Indians and thereby protect its Indian citizens.

The Arizona Court of Appeals rejected the logic and analysis proffered by the state and, instead, relied on the dicta negating state jurisdiction over these kinds of cases found in Williams v.

United States, 327 U.S. 711 (1946), and commentary interpreting this dicta. State v. Flint, Appendix A at 3-10. In Williams, the defendant, a non-Indian, had had sexual relations with a reservation Indian minor between the ages of 16 and 18. As the federal carnal knowledge statute (now codified at 18 U.S.C. § 2032) fixed the age of consent at 16, he could not be charged with violating it. Instead, he was charged in federal court with violating the Arizona statutory rape provision, which fixed the age of consent at 18. The theory of the prosecution was that the Arizona statute was made applicable to the reservation by the Assimilative Crimes Act, 18 U.S.C. § 13, and the General Crimes Act, (now codified at 18 U.S.C. § 1152). This Court held that use of the Assimilative Crimes Act was improper since Congress

had legislated with regard to the generic offense of sex with minors and deliberately selected the lower age of consent.

Although Williams raised no challenge to the jurisdiction of the federal court to try him, this Court delivered itself of the following dictum summarizing Indian country jurisdiction:

> While the laws and courts of the State of Arizona may have jurisdiction over offenses committed on this reservation between persons who are not Indians, the laws and courts of the United States, rather than those of Arizona, have jurisdiction over offenses committed there, as in this case, by one who is not an Indian against one who is an Indian.

327 U.S. at 714 (footnotes omitted; emphasis added). The Court cited Donnelly v. United States, 228 U.S. 243 (1913); United States v. Pelican, 232 U.S. 442 (1914); United States v. Ramsey, 271 U.S. 467 (1926); and United States v.

Chavez, 290 U.S. 357 (1933); to support its statement. Id. at note 10.

Each of the above-cited cases involved offenses committed by non-Indians against Indians, but none of them were state prosecutions in which state jurisdiction was challenged. The defendants challenged instead the jurisdiction of the federal courts, arguing that only the states had jurisdiction to try their cases. In each case, the Court ruled that the situs of the crime was Indian country and that admission to statehood did not divest the federal court of jurisdiction over offenses by or against Indians. In none of them, however, did the Court hold that federal jurisdiction over the non-Indian defendant was exclusive. Donnelly was the case principally relied on by the other three, and Williams itself recognized Donnelly

as the seminal case. See 327 U.S. at 714 n.10.

In Donnelly this Court rejected the contention that a non-Indian's offense against an Indian in Indian country fell "within the principle of the McBratney and Draper cases." The "principle" of McBratney and Draper was that federal jurisdiction over non-Indians under the General Crimes Act for offenses against non-Indians was divested when a territory entered the Union as a state, and that state jurisdiction over such offenses was exclusive. Instead, this Court held, the case was governed by the rationale of the Kagama case, which had held that because of the federal trust responsibility, federal jurisdiction over offenses by Indians were not divested by a territory entering into statehood. The same trust

obligation required continued federal jurisdiction over non-Indian offenders against Indians. Neither Kagama nor Donnelly, however, held or stated that such jurisdiction was exclusive. The emphasis in Kagama on the need to protect Indians from state prejudice would suggest that federal jurisdiction over Indian defendants should be exclusive, and, indeed this Court so held many years later in United States v. John, 437 U.S. 634, 654 (1978), with respect to the Major Crimes Act. The federal trust responsibility does not, however, require that its obligation to safeguard the Indian community against non-Indian depredations preempt state action.

Finally, the Arizona Court seemed to suggest that, if the state had jurisdiction over non-Indians who committed offenses against Indians, it

would have been unnecessary to provide in Public Law 83-280, codified at 18 U.S.C. § 1162 and 25 U.S.C. § 1321, that state jurisdiction was, or could be, extended to "offenses committed by or against Indians," since "by" alone would have been effective to divest the United States of exclusive jurisdiction over offenses enumerated in the Major Crimes Act. State v. Flint, Appendix A at 12-15. This argument overlooks the exclusive jurisdiction tribal courts have over offenses, not enumerated in the Major Crimes Act, committed by Indians against Indians. See 18 U.S.C. § 1152 paragraph 2; Ex Parte Crow Dog, 109 U.S. 556 (1883). Public Law 83-280 was designed not only to shift federal responsibility for major crimes to the state, but also to have the state undertake responsibility for minor

offenses that the tribes were unable to deal with effectively. See Washington v. Confederated Bands and Tribes of Yakima Indian Nation, 439 U.S. at 471, 488 n.32, 489 n.33. It was these crimes, not those by non-Indians, that required use of the word "against."

CONCLUSION

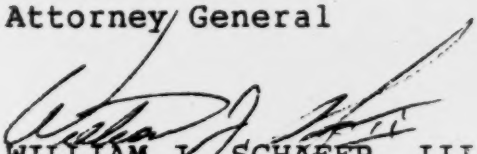
While the United States is obligated by its trust responsibilities to maintain jurisdiction over offenses by non-Indians against Indians in Indian country, there is no statute or United States Supreme Court case holding that such jurisdiction is exclusive and preemptive of the states. While historically, and as a practical matter, such offenses are "generally tried in federal courts," Williams v. Lee, 358 U.S. 217, 220 n.5, (1959), neither Indian sovereignty nor preemption forecloses state prosecution. Therefore, the State of Arizona requests

that this Court accept the petition for writ of certiorari, set aside the opinion of the Arizona Court of Appeals, and order that the charges, as originally indicted, be reinstated.

DATED this 5th day of October, 1988.

Respectfully submitted,

ROBERT K. CORBIN
Attorney General



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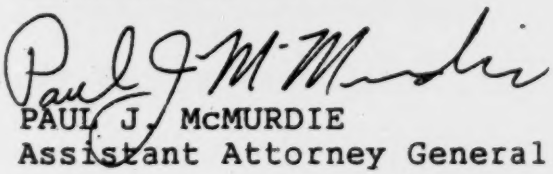

PAUL J. McMURDIE
Assistant Attorney General

Attorneys for PETITIONERS

A F F I D A V I T

STATE OF ARIZONA)
) ss.
COUNTY OF MARICOPA)

WILLIAM J. SCHAFER III, a member of the Bar of this Court, being duly sworn upon oath, deposes and says:

That he served three copies of the corrected Petition for Writ of Certiorari upon David J. Martin, Navajo County Public Defender, Navajo County Complex, P.O. Box 668, Holbrook, Arizona, 86025, Attorney for Conrad Marion Flint, by depositing the same in the United States Mail, with first class postage prepaid, return receipt requested.

Additionally, as a courtesy, he herewith certifies that service of three copies of this petition has been made upon the United States of America by depositing the same in the United States

Mail, with first class postage prepaid, addressed to the Solicitor General, Department of Justice, Washington, D.C. 20530.

DATED this 5th day of October, 1988.

WILLIAM J. SCHAFER III
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SUBSCRIBED AND SWORN to before me this 5th day of October, 1988.

CHRIS L. PISKE
NOTARY PUBLIC

My Commission Expires:

October 28, 1989

CRM86-1308
7145d jd (PJM)

APPENDICES

Filed January 19, 1988

STATE OF ARIZONA,	)	
	)	1 CA-CR 10650
Appellant,	)	
	)	DEPARTMENT B
v.	)	
	)	
CONRAD MARION FLINT,	)	O P I N I O N
	)	
Appellee.	)	
	)	

Appeal from the Superior Court

of Navajo County

Cause Nos. CR-9095 and CR-9129

The Honorable John L. Claborne, Judge

AFFIRMED

Robert K. Corbin, The Attorney General
by William J. Schafer III
Chief Counsel, Criminal Division
and Paul J. McMurdie,
Assistant Attorney General

Attorneys for Appellant Phoenix

David J. Martin, Navajo County Public Defender
Attorney for Appellee Holbrook

G R E E R, Judge

Appellee Flint was charged by indictment in Navajo County with four counts of oral sexual contact with a minor and four counts of commercial sexual exploitation of a minor. In a separate indictment, he was charged with six counts of oral sexual contact with a minor and two counts of commercial sexual exploitation of a minor. Since the jurisdiction issue was not raised at trial by either party, the trial judge requested memoranda and oral argument. On July 30, 1986, the court heard oral argument on the issue of jurisdiction and, on August 7, 1986, ruling that it did not have jurisdiction, ordered dismissal of both indictments. The state filed a timely notice of appeal from the dismissal.

The only question the state raises on appeal is whether the trial court erred by dismissing the action on the grounds that the state court has no criminal jurisdiction where a non-Indian allegedly commits a crime against an Indian on the reservation. The state does not deny federal jurisdiction, but argues, without supporting authority, that the state and federal courts have concurrent jurisdiction. Defendant, on the other hand, argues that federal jurisdiction is exclusive. We agree with defendant's position.

The Indian Country Crimes Act, 18 U.S.C. § 1152, provides:

> Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country.

> This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively.

The terms of this act include all offenses by non-Indians in Indian country. See F. Cohen, Handbook of Federal Indian Law 298 (1982 ed.) (Cohen). The United States Supreme Court carved out an exception to 18 U.S.C. § 1152 for offenses committed by non-Indians against non-Indians within Indian country. United States v. McBratney, 104 U.S. 621 (1882). However, criminal offenses by non-Indians against Indians or their property remain subject to federal jurisdiction pursuant to the Indian Country Crimes Act. "The Supreme Court has stated that federal court

jurisdiction under this Act is exclusive of state court jurisdiction." Cohen, at 353, citing Williams v. Lee, 358 U.S. 217, 220 n.5 (1959); Williams v. United States, 327 U.S. 711, 714 (1946).

> The general rule outside Indian affairs is that the state and federal governments may separately punish the same conduct. Abbate v. United States, 359 U.S. 187 (1959). In certain areas Congress has preempted state jurisdiction. E.g., Pennsylvania v. Nelson, 350 U.S. 497 (1956). Indian affairs has long been an area of broad federal preemption, see [Cohen, Ch. 5, Sec. B] and that factor alone is sufficient to conclude that the states cannot punish Indian defendants in Indian country. See United States v. Kagama, 118 U.S. 375 (1886). When a defendant is not Indian, traditional law from other fields might suggest that concurrent state and federal jurisdiction exists. But this traditional assumption is based on the typical situation where the state and federal governments seek to vindicate distinct governmental interests. The assumption has not been tested where both governments might seek to punish the same common law felony; in those circumstances, concurrent

> jurisdiction would be particularly troublesome. The potential for this problem arises in federal enclaves under concurrent jurisdiction. See United States v. State Tax Comm'n, 412 U.S. 363 (1973). Congress is aware of this problem, and current drafts of a revised federal criminal code propose that federal court jurisdiction over concurrent enclaves would be deemed preemptive over common law felonies but not other crimes. See S. 1722, 96th Cong., 2d Sess. § 206 (1979). These considerations suggest that the exclusive jurisdiction . . . is correct, but there may be concurrent state jurisdiction over a non-Indian defendant when there are victims of both races or in the class of "victimless" cases . . .

Cohen, at 353 n.44 (emphasis added).

In Williams v. United States, 327 U.S. 711, 714, 66 S. Ct. 778, 780, 90 L. Ed. 962 (1946), a non-Indian man was accused of having sexual intercourse with an underage Indian girl on the reservation; the United States Supreme Court preliminarily noted:

> While the laws and courts of the State of Arizona may have jurisdiction over offenses committed on this reservation between persons who are not Indians, the laws and courts of the United States, rather than those of Arizona, have jurisdiction over offenses committed there, as in this case, by one who is not an Indian against one who is an Indian.

(Emphasis added.)

The state suggests that this language is mere dicta, unnecessary to sustain the judgment of the court. Arizona Corp. Comm'n v. Mountain States Tel. & Tel. Co., 71 Ariz. 404, 228 P.2d 749 (1951). In Williams, the United States Supreme Court had to consider its own jurisdiction, but it did not have to consider whether Arizona and the federal courts had concurrent jurisdiction. While the language of Williams may have been dicta, it has not been seriously questioned. Cohen, at 353.

Williams cited Donnelly v. United States, 228 U.S. 243, 33 S. Ct. 449, 57 L. Ed. 820 (1913), which held that federal courts have jurisdiction where a non-Indian kills an Indian on a reservation within state boundaries, as the basis for the above-quoted proposition. Donnelly emphasized the protective purpose of federal jurisdiction and, in turn, cited United States v. Kagama, 118 U.S. 375, 383 (1885), which found exclusive federal jurisdiction where both the defendant and the victim were Indian because "the Indian tribes are the wards of the nation." Donnelly held that the ward rationale supporting exclusive federal jurisdiction applied "perhaps a fortiori--with respect to crimes committed by white men against the person or property of the Indian tribes while

occupying reservations set apart for the very purpose of segregating them from the whites and others not of Indian blood." 228 U.S. at 271-72, 33 S. Ct. at 459.[1]

Learned commentators on Indian law have also supported the result reached here. Cohen, at 298, states that Donnelly has consistently been followed and exclusive federal jurisdiction obtains where a non-Indian harms an Indian. Clinton, Criminal Jurisdiction over Indian Lands:

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[1]There is little case law on the subject, probably because the issue has been thought to be well-settled. In several cases involving Indians or Indian reservations where there has been a question of jurisdiction, the courts have noted the general scheme for criminal jurisdiction over crimes committed on the reservation and have stated that, absent federal law to the contrary, where non-Indians commit crimes against Indians on a reservation, they are subject to federal jurisdiction. E.g., Mell v. United States, 402 F.2d 571 (9th Cir. 1968); United States v. Johns, 587 F.2d 683, 686 (5th Cir. 1979); United States v. Johnson, 637 F.2d 1224 (9th Cir. 1980).

A Journey through a Jurisdictional Maze, 18 Ariz. L. Rev. 503, 523 n.94 (1976), noted that "[t]he prevailing rule today is that the federal jurisdiction conferred by [U.S.C.] sections 1152 and 1153 is exclusive; where one of these sections applies, the state has no jurisdiction."

Two recent federal court of appeals cases specifically state that federal criminal jurisdiction is exclusive over crimes committed in Indian country affecting an Indian as either the defendant or victim. In United States v. Torres, 733 F.2d 449 (7th Cir.), cert. denied, 469 U.S. 864 (1984), the defendant Indians were charged with the murder of a non-Indian. The defendants argued that the conspiracy to commit the murder and kidnapping occurred on state land; therefore, jurisdiction lay in

state court. The Seventh Circuit Court disagreed.

> It is equally clear, however, that under 18 U.S.C. § 1152, the federal court has exclusive jurisdiction to punish an Indian who participates in a conspiracy to murder a non-Indian within the federal territory of the Menominee Indian Reservation, provided that the Indian has not been punished by the tribe and the crime is not in the exclusive jurisdiction of the tribe. . . .

733 F.2d at 459 (emphasis added).

Langley v. Ryder, 778 F.2d 1092 (5th Cir. 1985), generally held:

> Once land is determined to be Indian country, state criminal jurisdiction is preempted by both federal protection of tribal self-government and federal statutes on subjects relating to Indians, tribes, their property and federal programs [citation omitted]. Federal protection of tribal self-government precludes criminal jurisdiction of state courts over Indians on their property absent the consent of Congress. [Citation omitted.] In order for a state to exercise criminal jurisdiction within Indian country there must be clear

and unequivocal grant of that authority.

778 F.2d at 1095-96 (emphasis added). The Fifth Circuit Court noted that, pursuant to Pub. L. 83-280 (25 U.S.C. § 1321), Congress granted certain states the power to exercise criminal jurisdiction within Indian land, but held that, because "Louisiana is not a P.L. 280 state, there is no effective Congressional grant of jurisdiction to Louisiana within Indian country. Thus the general rule that the federal, not the state government, has criminal jurisdiction over Indian lands applies." Id. at 996.

We find the cases discussing state criminal jurisdiction pursuant to acts of Congress or Pub. L. 83-280 persuasive. Pub. L. 83-280 specifically grants certain states broad criminal

jurisdiction over offenses committed by or against Indians on Indian land within state boundaries. See 18 U.S.C. § 1162(2)(a) (Alaska, California, Minnesota, Nebraska, Oregon and Wisconsin were expressly granted criminal jurisdiction over offenses committed within specified Indian country). Congress has also made separate grants of state criminal jurisdiction to individual states. For example, 28 U.S.C. § 3243 specifically authorized Kansas to have concurrent criminal jurisdiction with the federal courts over Indian reservations in that state. See Iowa Tribe of Indians v. Kansas, 787 F.2d 1434 (10th Cir. 1986). See also, California v. Cabazon Band of Mission Indians, 55 U.S.L.W. 4225 (U.S.S. Ct., Feb. 25, 1987); State v. Hoddie, 588 F.2d 292 (9th Cir. 1978); Arquette v. Schechloth, 351 P.2d 921 (Wyo. 1960).

Pub. L. 83-280 further allowed unnamed states to assume criminal jurisdiction over Indian lands within their borders if they met certain requirements and obtained the consent of the tribe over which they desired jurisdiction. Pub. L. 90-284, Title IV, § 401, Apr. 11, 1968, 82 Stat. 78; Langley v. Ryder, 733 F.2d at 1096. Section 6 of the Act of Aug. 15, 1953, c.505, 67 Stat. 590 [Pub. L. 83-280], provided that:

> [n]otwithstanding the provisions of any Enabling Act for the admission of a State, the consent of the United States is hereby given to the people of any State to amend, where necessary, their State constitution or existing statutes, as the case may be, to remove any legal impediment to the assumption of civil and criminal jurisdiction in accordance with the provisions of this Act [adding section 1360 of this title and section 1162 of Title 18]: Provided, That the provisions of this Act shall not become effective with respect to such assumption of jurisdiction by any such State until the people

> thereof have appropriately amended their State constitution or statutes as the case may be.

In Section 7, Congress gave consent to any other state not having criminal and/or civil jurisdiction to assume jurisdiction at the time and in the manner the people of that state, by legislative action, obligate and bind the state to do so.[2]

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[2]That part of Pub. L. 83-280 which permitted assumption of civil and/or criminal jurisdiction by states not having such was repealed by Pub. L. 90-284, Title IV, § 403(b), Apr. 11, 1968, 82 Stat. 79. This repeal was not to affect any cession of jurisdiction made pursuant to 18 U.S.C. § 1162 (criminal jurisdiction) or 28 U.S.C. § 1360 (civil jurisdiction) prior to repeal. However, the repeal did close the door on any subsequent cession of civil or criminal jurisdiction to the states under either statute. See also, Langley v. Ryder, 602 F. Supp. 335, 344 (W.D. La.), aff'd, 778 F.2d 1092 (5th Cir. 1985).

Section 20 of Arizona's Enabling Act, Act June 20, 1910, c.310, 36 Stat. 557, 568-579, provides in pertinent part:

> [t]hat the people inhabiting said proposed State do agree and declare that they forever disclaim all right and title to the unappropriated and ungranted public lands lying within the boundaries thereof and to all lands lying within said boundaries owned or held by an Indian or Indian tribes, the right or title to which shall have been acquired through or from the United States or any prior sovereignty, and that until the title of such Indian or Indian tribes shall have been extinguished the same shall be and remain subject to the disposition and under the absolute jurisdiction and control of the Congress of the United States;
> . . .

Ariz. Const. art. 20, para. 4, adopts virtually identical language.[3]

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[3]Article I of the treaty between the United States Government and the Navajo Indian Tribe also provides:

> If bad men among the whites, or among other people subject to the authority of the United States,

Under A.R.S. § 36-1801, Arizona has assumed jurisdiction over Indian lands pursuant to Pub. L. 83-280 for the limited purpose of enforcing air pollution control laws.[4] However, Congress has not made an express grant of state criminal jurisdiction over the

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> shall commit any wrong upon the person or property of the Indians, the United States will, upon proof made to the agent and forwarded to the Commissioner of Indian Affairs at Washington City, proceed at once to cause the offender to be arrested and punished according to the laws of the United States, and also to reimburse the injured persons for the loss sustained.

Treaty of 1868, August 12, 1868, art. I, 15 Stat. 667; Navajo Trib. Code, App., at 9 (1978). Cf. United States v. Superior Court In & For Maricopa County, 144 Ariz. 265, 697 P.2d 658 (1985).

[4]Section 36-1801 was renumbered as A.R.S. § 49-561 by Laws 1986, ch. 368, § 39, effective July 1, 1987.

Navajo reservation,[5] nor has the state assumed such jurisdiction in accordance with Pub. L. 83-280. Moreover, the time for the state to assume either civil or criminal jurisdiction has passed.[6] Consequently, it would be inappropriate for this court to redefine Arizona's criminal jurisdiction when such jurisdiction is obviously a matter of federal legislative concern.

The United States Supreme Court held that 18 U.S.C. § 1153, which allocates jurisdiction between the federal and

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[5]Congress has expressly given Arizona criminal and civil jurisdiction over the Pascua Yaqui Indian reservation. 25 U.S.C. § 1300f(c). However, it is not clear whether such delegation is still effective in the face of the Arizona Governor's attempted retrocession of jurisdiction and Ariz. Const. art. 20, para. 4, which disclaims any jurisdiction over Indians or their land. See Val/Del, Inc. v. Superior Court, 145 Ariz. 558, 564 n.2, 703 P.2d 502, 508 n.2 (App. 1985).

[6]See note 2, supra.

tribal courts in cases of crimes between Indians on Indian Land, does not allow for concurrent state jurisdiction in such cases. United States v. John, 437 U.S. 634, 98 S. Ct. 2541, 57 L. Ed. 2d 489 (1978). If concurrent state jurisdiction does not exist under 18 U.S.C. § 1153, it seems likely that a similar result should obtain under 18 U.S.C. § 1152.

State v. Burrola, 137 Ariz. 181, 669 P.2d 614 (App. 1983), can be distinguished and is of no aid to the state. In Burrola, this court found that the state had jurisdiction where a non-Indian committed a victimless crime on the Indian reservation. The court first noted the long-established exception to exclusive federal jurisdiction which provides for exclusive state jurisdiction over crimes committed by non-Indians against non-Indians, even

though on the reservation. McBratney, 104 U.S. 621; State v. Griswold, 101 Ariz. 577, 578, 422 P.2d 693, 694 (1967). The rationale for this exception is that such crimes do not involve essential tribal relations or affect the rights of Indians. Burrola, 137 Ariz. at 182. This court found the same reasoning applicable where a non-Indian commits a victimless crime on an Indian reservation.

By contrast, in a situation such as this, both the Indian tribe and the federal government, which acts as the Indians' guardian, have a very strong interest. The appellee here is charged with serious sexual crimes against several young Indian males, thus creating a strong tribal interest. In this respect, this case is similar to Williams v. United States, 327 U.S. 711, 66 S. Ct. 449, where the non-Indian defendant was

charged with having sexual contact with an underage Indian female. Further, in Williams, the court noted that federal jurisdiction was especially applicable "with respect to crimes committed by white men against the persons or property of Indian tribes while occupying reservations . . . ." 66 S. Ct. at 459, citing Donnelly, 228 U.S. 243, 33 S. Ct. 449.

We conclude the state has no jurisdiction in this case. The trial court's order dismissing the state's prosecution is affirmed.

/S/
D. L. Greer, Judge

CONCURRING:

/S/
JOE W. CONTRERAS
Presiding Judge, Department B

/S/
NOEL FIDEL, Judge

APPENDIX B

ORDER OF THE ARIZONA SUPREME COURT

SUPREME COURT

STATE OF ARIZONA

201 WEST WING STATE CAPITOL
1700 WEST WASHINGTON
PHOENIX, ARIZONA 85007-2866

TELEPHONE (602) 255-4536

July 13, 1988

RE: STATE OF ARIZONA vs. CONRAD MARION FLINT

Supreme Court No. CR-88-0083-PR

Court of Appeals No. 1 CA-CR 10650

Navajo County No. CR-9095 & CR-9129

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on July 12, 1988, in regard to the above-referenced cause:

ORDERED: Petition for Review = DENIED.

Record returned to the Court of Appeals, Division One, Phoenix, this 13th day of July, 1988.

DAVID R. COLE, Clerk

TO:

Hon. Robert K. Corbin, Attorney General

ATTN: Paul J. McMurdie, Esq.

David J. Martin, Navajo County Public Defender

Glen D. Clark, Clerk, Court of Appeals, Division One

APPENDIX C

MINUTE ENTRY DATED AUGUST 7, 1986

IN THE SUPERIOR COURT
OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF NAVAJO

IN CHAMBERS ( ) IN OPEN COURT ( )

HON. JOHN L. CLABORNE, JUDGE

_____ By: Joy R. Allen
Presiding

COURT REPORTER (none)

==========

CRIMINAL
XXXXXXXXXX. 9095 & 9129 DATE: August 7, 1986

TIME 11:40 o'clock A.M.

STATE OF ARIZONA — DALE PATTON
Plaintiff, — Attorney for Plaintiff

vs.

CONRAD FLINT — G. TERRIS PORTER
Defendant. — Attorney for DEFENDANT

==========

MINUTE ENTRY

This Court during the Omnibus Hearing requested by the Defendant expressed its concern to Counsel concerning this Court's jurisdiction. Since the issue of

jurisdiction had not been raised by either counsel, the Court request memoranda and oral argument. The Court reviewed the memoranda filed herein and held oral argument on Wednesday, July 30, 1986. The matter was then taken under advisement.

Because of the extremely serious nature of the offenses charged in the indictment in this case and in cause number 9129, the Court feels compelled to state its reasons for its decision on jurisdiction.

The Defendant, in May of 1986, was indicted in multiple counts alleging sexual conduct with a minor and sexual exploitation of a minor. All counts in both indictments are Class 2 felonies and if convicted, the Defendant would not only be subject to the penalty for Class 2 felonies, but would also be subject to the provisions of A.R.S.

13-604.01 which provides for enhanced punishment upon conviction. The factual allegations in both indictments, as well as the testimony presented to the Grand Jury upon which the indictments are based, allege that the Defendant, a non-Indian school teacher, took pictures of male Indian children in the nude sexually playing with each other and engaged in various sexual acts with each other and the Defendant. The photographs of the acts with several male Indian children were still photographs and also videotapes of that deviant sexual activity.

The simple issue presented by these facts is whether the State of Arizona has jurisdiction to prosecute a non-Indian Defendant who commits criminal offenses upon Indian children on the Navajo Indian Reservation.

The memorandum and oral argument of the State takes the position that the State of Arizona has concurrent jurisdiction with the Federal government in the prosecution of a non-Indian committing crimes against Indians on the Navajo Reservation. The State conceded that it has no Federal, State or United States Supreme Court case to justify this position. The State concedes that there is no question that the United States has the jurisdiction to charge the Defendant with crimes allegedly committed by him and prosecute him in Federal Court. At the time of oral argument, there was no satisfactory explanation of why, in view of the extremely serious nature of these charges, the United States Attorney did not prosecute the Defendant. The State further conceded in oral argument that all of the decided authority concerning

this issue repeatedly held that the prosecution of a non-Indian who commits a crime against an Indian on the Navajo Reservation is exlusively [sic] within the jurisdiction of the Federal government.

The initial case concerning who has jurisdiction over an offense committed by a non-Indian against an Indian on an Indian Reservation is Donnelly vs. United States, 228 US 243, 57 LEd 820. The issue presented here was clearly stated by the Unites [sic] States Supreme Court in Donnelly.

> "This same reason applies -- perhaps a fortiori -- with respect to crimes committed by white men against the persons or property of the Indian Tribes while occupying reservations set apart for the very purpose of segregating them from the whites and others not of Indian blood.
>
> The result is that, in our opinion, the offense with which the Plaintiff in error was charged

was punishable in the Federal Courts under Section 2145 and 5339, Rev. Stat."

The law has not changed since Donnelly. In Williams vs. United States, 327 US 711, 91 LEd 962, in 1946 the United States Supreme Court in deciding the applicability of the Assimilative Crimes Act involving a non-Indian committing a rape of an Indian girl on a reservation held as follows:

> "While the laws and the Courts of the State of Arizona may have jurisdiction over offenses committed on a reservation between persons who are not Indians, the laws and the Courts of the United States, rather than those of Arizona, have jurisdiction over offenses committed there as in this case by one who is not an Indian against one who is an Indian." (emphasis supplied)

The Williams Court reviewed Donnelly, its progenitors, the Arizona Enabling Act, and the treaty between the Navajo Nation and the United States in reaching its decision.

In United States vs. Lee, 358 US 217, 3 LEd 2d 251, a 1959 United States Supreme Court dealing with civil jurisdiction, Mr. Justice Black said as follows:

> "But if the crime was by or against an Indian, tribal jurisdiction or that expressly conferred on other courts by Congress has remained exclusive." (emphasis supplied)

If these pronouncements by our United States Supreme Court on the very issue presented here were not enough, as late as 1979 in U.S. vs. John, 587 F2d 683, the Fifth Circuit Court deciding the jurisdictional issue as well as the applicability of 18 USC Section 1152 and 1153 said, again, that it was Congressional power that allowed State jurisdiction over crimes committed within its borders on an Indian Reservation by a non-Indian on an Indian. John discussed that each entity -- Indian, the Federal

government, and the State government -- had a social basis for wanting to prosecute these types of crimes. The Court clearly indicated that it was Congress that had stripped the States of the power to punish these offenses through the State courts.

This Court also cannot ignore Public Law 280. That Federal Statute not only compelled six states to assume jurisdiction of criminal and civil offenses committed on Indian reservations, it also permitted the assumption of Indian jurisdiction by any other states that desired to do so. The Act gave Congressional consent to the assumption by the States of criminal and civil jurisdiction by affirmative legislative action, and furthermore gave Congressional consent to the amendment of the State Constitution which contained

disclaimers of jurisdiction over Indian lands (like the Arizona Enabling Act). Arizona did not avail itself of this law. Clinton, "Criminal Jurisdiction over Indian Lands: a Journey through a Jurisdictional Maze," 18 Ariz LR 503 (1977). It may be interesting to also note that Clinton indicated as follows:

> "First, in enacting Public Law 280, Congress did not expressly preserve Federal jurisdiction. Second, because of the potential multiple prosecution aspects of concurrent jurisdiction and its concomitant Fifth Amendment implications, Congress has rather consistently frowned on concurrent State-Federal jurisdictional arrangements for Indian lands." (emphasis supplied)

The State's argument is that although they recognized the past pronouncements of the United Sates [sic] Supreme Court, that now in Navajo County, in 1986, the law ought to be different. No matter how much this Court may want to agree with

the prosecution's view concerning this particular case at this particular time, the law is clear that exclusive Federal jurisdiction applies to those crimes committed against a Navajo Indian on the Navajo Reservation by a non-Indian. It would seem to this Court that the County Attorney should do everything in his power to assist the Federal authorities to prosecute those cases which the County Attorney feels are so serious that prosecution by the Federal government is mandated.

Further, this Court feels that it is not the proper forum to change the law nor ignore it. If the County Attorney feels that the law should be changed, then the appropriate path would be through the Federal Courts or through Congress.

IT IS THEREFORE ORDERED that the State of Arizona has no jurisdiction to prosecute the Defendant in Cause numbers 9095 and 9129.

IT IS FURTHER ORDERED releasing the Defendant from State custody.

cc: Dale Patton
NAVAJO COUNTY ATTORNEY

G. Terris Porter
ATTORNEY AT LAW
P.O. Box 999
Show Low, AZ 85901

APPENDIX D

TREATY OF JUNE 1, 1868

TREATY OF JUNE 1, 1868

TREATY
BETWEEN THE UNITED STATES OF AMERICA
and
THE NAVAJO TRIBE OF INDIANS

Concluded June 1, 1868
Ratification Advised July 25, 1868
Proclaimed August 12, 1868

ANDREW JOHNSON, President of the United States of America, to all and singular to whom these presents shall come, greeting:

Whereas a Treaty was made and concluded at Fort Sumner, in the Territory of New Mexico, on the first day of June, in the year of our Lord one thousand eight hundred and sixty-eight, by and between Lieutenant General W. T. Sherman and Samuel F. Tappan, Commissioners, on the part of the United States, and Barboncito, Armijo, and other Chiefs and Headmen of the Navajo tribe of Indians,

on the part of said Indians, and duly authorized thereto by them, which Treaty is in the words and figures following, to wit:

Articles of a Treaty and Agreement made and entered into at Fort Sumner, New Mexico, on the first day of June, 1868, by and between the United States, represented by its commissioners, Lieutenant General W. T. Sherman and Colonel Samuel F. Tappan of the one part, and the Navajo nation or tribe of Indians, represented by their Chiefs and Headmen, duly authorized and empowered to act for the whole people of said nation or tribe, (the names of said Chiefs and Headmen being hereto subscribed,) of the other part, witness:

ARTICLE I.

From this day forward all war between the parties to this agreement shall forever cease. The government of the United States desires peace, and its honor is hereby pledged to keep it. The Indians desire peace, and they now pledge their honor to keep it.

If bad men among the whites, or among other people subject to the authority of the United States, shall commit any wrong upon the person or property of the Indians, the United States will, upon proof made to the agent and forwarded to the Commissioner of Indian Affairs at Washington city, proceed at once to cause the offender to be arrested and punished according to the laws of the United States, and also to reimburse the injured persons for the loss sustained.

If bad men among the Indians shall commit a wrong or depredation upon the person or property of any one, white, black, or Indian, subject to the authority of the United States and at peace therewith, the Navajo tribe agree that they will on proof made to their agent, and on notice by him, deliver up the wrongdoer to the United States, to be tried and punished according to its laws; and in case they wilfully refuse to do so, the person injured shall be reimbursed for his loss from the annuities or other moneyes due or to become due to them under this treaty, or any others that may be made with the United States. And the President may prescribe such rules and regulations for ascertaining damages under this article as in his judgement may be proper; but no such damage shall be adjusted and paid until examined and

passed upon by the Commissioner of Indian Affairs, and no one sustaining loss whilst violating, or because of his violating, the provisions of this treaty or the laws of the United States, shall be reimbursed therefor.

ARTICLE II.

The United States agrees that the following district of country, to wit: bounded on the north by the 37th degree of north latitude, south by an east and west line passing through the site of old Fort Defiance, in Canon Bonito, east by the parallel of longitude which, if prolonged south, would pass through old Fort Lyon, or the Ojo-de-Oso, Bear Spring, and west by a parallel of longitude about 109 degrees 30' west of Greenwich, provided it embraces the outlet of the Canon-de-Chilly, which canon is to be all included in this

reservation, shall be, and the same is hereby, set apart for the use and occupation of the Navajo tribe of Indians, and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit among them; and the United States agrees that no persons except those herein so authorized to do, and except such officers, soldiers, agents, and employes of the government, or of the Indians, as may be authorized to enter upon Indian reservations in discharge of duties imposed by law, or the orders of the President, shall ever be permitted to pass over, settle upon, or reside in, the territory described in this article.

ARTICLE III.

The United States agrees to cause to be built at some point within said reservation, where timber and water may be convenient, the following buildings: a warehouse, to cost not exceeding twenty-five hundred dollars; an agency building for the residence of the agent, not to cost exceeding three thousand dollars; a carpenter shop and a blacksmith shop, not to cost exceeding one thousand dollars each; and a schoolhouse and chapel, so soon as a sufficient number of children can be induced to attend school, which shall not cost to exceed five thousand dollars.

ARTICLE IV.

The United States agrees that the agent for the Navajos shall make his home at the agency building; that he shall reside among them and keep an office open at all

times for the purpose of prompt and diligent inquiry into such matters of complaint by or against the Indians as may be presented for investigation, as also for the faithful discharge of other duties enjoined by law. In all cases of depredation on person or property he shall cause the evidence to be taken in writing and forwarded, together with his finding, to the Commissioner of Indian Affairs, whose decision shall be binding on the parties to this treaty.

ARTICLE V.

If any individual belonging to said tribe, or legally incorporated within it, being the head of a family, shall desire to commence farming, he shall have the privilege to select, in the presence and with the assistance of the agent then in charge, a tract of land within said

reservation, not exceeding one hundred and sixty acres in extent, which tract, when so selected, certified, and recorded in the "land book", as herein described, shall cease to be held in common, but the same may be occupied and held in the exclusive possession of the person selecting it, and of his family, so long as he or they may continue to cultivate it.

Any person over eighteen years of age, not being the head of a family, may in like manner select, and cause to be certified to him or her for purposes of cultivation, a quantity of land, not exceeding eighty acres in extent, and thereupon be entitled to the exclusive possession of the same as above directed.

For each tract of land so selected a certificate containing a description

thereof, and the name of the person selecting it, with a certificate endorsed thereon that the same has been recorded, shall be delivered to the party entitled to it by the agent, after the same shall have been recorded by him in a book to be kept in his office, subject to inspection, which said book shall be known as the "Navajo Land Book".

The President may at any time order a survey of the reservation, and, when so surveyed, Congress shall provide for protecting the rights of said settlers in their improvements, and may fix the character of the title held by each. The United States may pass such laws on the subject of alienation and descent of property between the Indians and their descendants as may be thought proper.

ARTICLE VI.

In order to insure the civilization of the Indians entering into this treaty, the necessity of education is admitted, especially of such of them as may be settled on said agricultural parts of the reservation, and they therefor pledge themselves to compel their children, male and female, between the ages of six and sixteen years, to attend school; and it is hereby made the duty of the agent for said Indians to see that this stipulation is strictly complied with; and the United States agrees that, for every thirty children between said ages who can be induced or compelled to attend school, a house shall be provided, and a teacher competent to teach the elementary branches of an English education shall be furnished, who will reside among said Indians, and faithfully discharge his or her duties as a teacher.

The provisions of this article to continue for not less than ten years.

ARTICLE VII.

When the head of a family shall have selected lands and received his certificate as above directed, and the agent shall be satisfied that he intends in good faith to commence cultivating the soil for a living, he shall be entitled to receive seeds and agricultural implements for the first year, not exceeding in value one hundred dollars, and for each succeeding year he shall continue to farm, for a period of two years, he shall be entitled to receive seeds and implements to the value of twenty five dollars.

ARTICLE VIII.

In lieu of all sums of money or other annuities provided to be paid to the Indians herein named under any treaty or treaties heretofore made, the United States agrees to deliver at the agency house on the reservation herein named, on the first day of September of each year for ten years, the following articles, to wit:

Such articles of clothing, goods, or raw materials in lieu thereof, as the agent may make his estimate for, not exceeding in value five dollars per Indian--each Indian being encouraged to manufacture their own clothing, blankets, etc.; to be furnished with no article which they can manufacture themselves. And in order that the Commissioner of Indian Affairs may be able to estimate properly for the

articles herein named, it shall be the duty of the agent each year to forward to him a full and exact census of the Indians, on which the estimate from year to year can be based.

And in addition to the articles herein named, the sum of ten dollars for each person entitled to the beneficial effects of this treaty shall be annually appropriated for a period of ten years, for each person who engages in farming or mechanical pursuits, to be used by the Commissioner of Indian Affairs in the purchase of such articles as from time to time the conditions and necessities of the Indians may indicate to be proper; and if within the ten years at any time it shall appear that the amount of money needed for clothing under the article can be appropriated to better uses for the

Indians named herein, the Commissioner of Indian Affairs may change the appropriation to other purposes, but in no event shall the amount of this appropriation be withdrawn or discontinued for the period named, provided they remain at peace. And the President shall annually detail an officer of the army to be present and attest the delivery of all the goods herein named to the Indians, and he shall inspect and report on the quantity and quality of the goods and the manner of the delivery.

ARTICLE IX.

In consideration of the advantages and benefits conferred by this treaty and the many pledges of friendship by the United States, the tribes who are parties to this agreement hereby stipulate that they

will relinquish all right to occupy any territory outside their reservation, as herein defined, but retain the right to hunt on any unoccupied lands continuous to their reservation, so long as the large game may range thereon in such numbers as to justify the chase; and they, the said Indians, further expressly agree:

1st. That they will make no opposition to the construction of railroads now being built, or hereafter to be built, across the continent.

2nd. That they will not interfere with the peaceful construction of any railroad not passing over their reservation as herein defined.

3rd. That they will not attack any persons at home or travelling, nor molest or disturb any wagon trains, coaches, mules or cattle belonging to the people of the United States, or to persons friendly therewith.

4th. That they will never capture or carry off from the settlements women or children.

5th. That they will never kill or scalp white men, nor attempt to do them harm.

6th. They will not in future oppose the construction of railroads, wagon roads, mail stations, or other works of utility or necessity which may be ordered or permitted by the laws of the United States; but should such roads or other

works be constructed on the lands of their reservation, the government will pay the tribe whatever amount of damage may be assessed by three disinterested commissioners to be appointed by the President for that purpose, one of said commissioners to be chief or head man of the tribe.

7th. They will make no opposition to the military posts or roads now established, or that may be established, not in violation of treaties heretofore made or hereafter to be made with any of the Indian tribes.

ARTICLE X.

No future treaty for the cession of any portion or part of the reservation herein described, which may be held in common, shall be of any validity or force against

said Indians unless agreed to and executed by at least three-fourths of all the adult male Indians occupying or interested in the same; and no cession by the tribe shall be understood or construed as to deprive, without his consent, any individual member of the tribe of his rights to any tract of land selected by him as provided in Article V of this treaty.

ARTICLE XI.

The Navajos also agree hereby that at any time after the signing of these presents they will proceed in such manner as may be required of them by the agent, or by the officer charged with their removal, to the reservation herein provided for, the United States paying for their subsistence en route, and providing a reasonable amount of transportation for the sick and feeble.

ARTICLE XII.

It is further agreed by and between the parties to this agreement that the sum of one hundred and fifty thousand dollars appropriated, or to be appropriated, shall be disbursed as follows, subject to any conditions provided in the law, to wit:

1st. The actual cost of the removal of the tribe from the Bosque Redondo reservation to the reservation, say fifty thousand dollars.

2nd. The purchase of fifteen thousand sheep and goats, at a cost not to exceed thirty thousand dollars.

3rd. The purchase of five hundred beef cattle and a million pounds of corn, to be collected and held at the military

post nearest the reservation, subject to the orders of the agent, for the relief of the needy during the coming winter.

4th. The balance, if any, of the appropriation to be invested for the maintenance of the Indians pending their removal, in such manner as the agent who is with them shall determine.

5th. The removal of this tribe to be made under the supreme control and direction of the military commander of the Territory of New Mexico, and when completed, the management of the tribe to revert to the proper agent.

ARTICLE XIII.

The tribe herein named, by their representatives, parties to this treaty, agree to make the reservation herein

described their permanent home, and they will not as a tribe make any permanent settlement elsewhere, reserving the right to hunt on the lands adjoining the said reservation formerly called theirs, subject to the modifications named in this treaty and the orders of the commander of the department in which said reservation may be for the time being; and it is further agreed and understood by the parties to this treaty, that if any Navajo Indian or Indians shall leave the reservation herein described to settle elsewhere, he or they shall forfeit all the rights, privileges, and annuities conferred by the terms of this treaty; and it is further agreed by the parties to this treaty, that they will do all they can to induce Indians now away from reservations set apart for the exclusive use and occupation of the

Indians, leading a nomadic life, or engaged in war against the people of the United States, to abandon such a life and settle permanently in one of the territorial reservations set apart for the exclusive use and occupation of the Indians.

In testimony of all which the said parties have hereunto, on this the first day of June, eighteen hundred and sixty-eight, at Fort Sumner, in the Territory of New Mexico, set their hands and seals.

W. T. SHERMAN,
Lt. Gen'l, Indian Peace Commissioner.

S. F. TAPPAN,
Indian Peace Commissioner.

BARBONCITO, Chief (his mark)

ARMIJO " "

DELGADO " "

MANUELITO " "

CHIQUETO " "

MUERTO DE HOMBRE " "

HOMBRO " "

NARBONO " "

NARBONO SEGUNDO " "

GANADO MUCHO " "

Council

RIQUO (his mark)

JUAN MARTIN " "

SERGINTO " "

GRANDE " "

INOETENITO " "

MUCHACHOS MUCHO " "

CHIQUETO SEGUNDO " "

CABELLO AMARILLO " "

FRANCISCO	"	"
TORIVIO	"	"
DESDENDADO	"	"
JUAN	"	"
GUERO	"	"
GUGADORE	"	"
CABASON	"	"
BARBON SEGUNDO	"	"
CABARES COLORADOS	"	"

Attest:

Geo. W. Getty
Col. 37th Inf'y.
Bt. Maj. Gen'l U.S.A.

B. S. Roberts,
Bt. Brg. Gen'l, U.S.A.,
Lt. Col. 3d Cav'y.

J. Cooper McKee,
Bt. Lt. Col. Surgeon U.S.A.

Theo. H. Dodd,
U.S. Indian Agent for the
Navajos.

Chas. McClure,

Bt. Maj. and C.S. U.S.A.

James F. Weeds,

Bt. Maj. and Asst. Surg.

U.S.A.

J. C. Sutherland,

Interpreter.

William Vaux,

Chaplain U.S.A.

And whereas the said treaty having been submitted to the Senate of the United States for its constitutional action thereon, the Senate did, on the twenty fifth day of July, one thousand eight hundred and sixty-eight, advise and consent to the ratification of the same, by a resolution in the words and figures following, to wit:

IN EXECUTIVE SESSION, SENATE OF THE UNITED STATES, July 25, 1868.

Resolved, (two-thirds of the senators present concurring) That the Senate advise and consent to the ratification of the treaty between the United States and the Navajo Indians, concluded at Fort Sumner, New Mexico, on the first day of June, 1868.

Attest: Geo. C. Gorham,
Secretary.
By W. J. McDonald,
Chief Clerk.

Now, therefore, be it known that I, ANDREW JOHNSON, President of the United States of America, do, in pursuance of the advice and consent of the Senate, as expressed in its resolution of the twenty-fifth of July, one thousand eight

hundred and sixty-eight, accept, ratify, and confirm the said treaty.

In testimony whereof, I have hereto signed by name, and caused the seal of the United States to be affixed.

Done at the city of Washington, this twelfth day of August, in the year of our Lord one thousand eight hundred and sixty-eight, and of the Independence of the United States of America, the ninety-third.

(Seal) ANDREW JOHNSON

By the President:

W. Hunter,

Acting Secretary of State.

* * * * * * *

7188d jd

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No. 88-603

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

STATE OF ARIZONA,

Petitioner,

-vs-

CONRAD MARION FLINT,

Respondent,

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE ARIZONA COURT OF APPEALS

FREDRIC F. KAY
Federal Public Defender
District of Arizona

JON M. SANDS
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Attorneys for RESPONDENT

QUESTION PRESENTED

Can the State of Arizona have concurrent jurisdiction with the federal government to prosecute a non-Indian for a criminal offense committed against an Indian occuring on the Navajo Indian reservation?

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OPINION BELOW

The Arizona Court of Appeals' opinion held that federal criminal jurisdiction is exclusive over alleged crimes committed by a non-Indian against Indians on an Indian reservation. State v. Flint, 157 Ariz. 227, 756 P.2d 324 (Ct.App. 1988). The bases of the holding were (1) this Court's clear statement in Williams v. United States, 327 U.S. 711, 714 (1946) that "the laws and courts of the United States, rather than those of Arizona, have jurisdiction over offenses committed [on the reservation] by one who is not an Indian against one who is an Indian"; and (2) in light of the congressional intent to preserve exclusive federal jurisdiction unless affirmatively and unequivocally relinquished.

JUDGMENT SOUGHT TO BE REVIEWED

The respondent, Conrad Marion Flint, defendant-appellee in the court below, respectfully prays that the Petition for Writ of Certiorari to the Court of Appeals for the State of Arizona docketed on September 8, 1988 be denied.

JURISDICTION

The Supreme Court of Arizona denied review of this case on July 13, 1988. The petition was timely filed within sixty days of the Arizona Supreme Court's order denying the state's petition for review. This Court returned the petitien as its appendix was printed improperly. The corrected petition then was timely filed within twenty-one days of receipt of the return petition.

The jurisdiction of this Court was invoked under U.S. Const. art. III, §2, 28 U.S.C. §1254(1), and United States Supreme Court Rule 20.1.

CONSTITUTIONAL PROVISIONS, STATUTES, AND TREATIES INVOLVED

The applicable statutes and treaties are the same as reproduced in petitioner's brief.

STATEMENT OF FACTS

Respondent accepts petitioner's rendition of the factual background. Respondent wishes to add that he is presently serving a sentence of imprisonment at the Federal Correctional Institute in Sandstone, Minnesota as a result of a federal conviction for the same acts which are the basis of this petition.

REASONS FOR DENYING THE PETITION

I. Because of the Currently Existing Exclusive Jurisdiction Vested with the Federal Government, the State of Arizona has no Jurisdiction to Prosecute a Non-Indian for a Criminal Offense Committed Against an Indian Occuring on the Navajo Indian Reservation.

The decision of the Court of Appeals of the State of Arizona upholding exclusive federal jurisdiction for alleged crimes committed by a non-Indian against Indians on a reservation is neither in conflict with federal law, nor the decisions of this Court nor of any federal circuit court of appeals. Indeed, the decision clearly conforms with both federal law and prior precedent in protecting what is recognized as important federal and tribal issues. 18 U.S.C. §1162; 25 U.S.C. §1321; Williams v. United States, 327 U.S. 711 (1946). A granting of certiorari therefore is unwarranted.

The State of Arizona however seeks to have this Court create an exception to the established policy of exclusive federal jurisdiction over non-Indians committing crimes against Indians. Arizona looks for support to United States v. McBratney, 104 U.S. 621 (1882), which established an exception for crimes committed by non-Indians against other non-Indians on reservation land. The rational for this exception, that there is no tribal or federal interest where neither the offender nor the victim are Indians, cannot be extended to permit concurrent state jurisdiction in the instance involving a non-Indian offender allegedly committing crimes against Indians on the reservation. The Court of Appeals'

decision effectively refutes Arizona's argument.

In its opinion, the Arizona Court of Appeals considered Williams v. United States, 327 U.S. at 714, where this Court dealt with whether a non-Indian man who was accused of having carnal knowledge of an underage Indian girl could be prosecuted under a state statute pursuant to the Assimilative Crimes Act, 18 U.S.C. §13 and the General Crimes Act (now codified at 18 U.S.C. §1152). At the outset in Williams, this Court articulated the special relationship existing between Indians and the federal government that resulted in exclusive federal jurisdiction. As this Court unequivocally stated:

> While the laws and courts of the State of Arizona may have jurisdiction over offenses committed on this reservation between persons who are not Indians, the laws and courts of the United States, rather than those of Arizona, have jurisdiction over offenses committed there, as in this case, by one who is not an Indian against one who is an Indian.

Id. at 714 (quoted in State v. Flint, ___ Ariz. ___, 756 F.2d 324, 325 (Ariz. App. 1988). This Court then went on to hold that the Assimilative Crimes Act was inapplicable where Congress had specifically enacted legislation.

As the Arizona Court of Appeals acknowledged, nothing in the forty years since Williams has changed this broad principle. Indeed, the principle articulated in Williams itself was the result of this Court's long awareness of the special federal status Indians enjoy as wards of the nation. E.g., Donnelly v. United States, 228 U.S. 243 (1913) (federal jurisdiction when a

non-Indian kills an Indian on reservation); United States v. Kagama, 118 U.S. 375 (1885) (same). This has also been the view of recent Federal Court of Appeals cases that specifically state that federal criminal jurisdiction is exclusive for crimes committed in Indian country affecting Indians as either defendants or victims. Langley v. Ryder, 778 F.2d 1092 (5th Cir. 1985); United States v. Torres, 733 F.2d 449 (7th Cir.), cert. denied, 469 U.S. 864 (1984).

The Arizona Court of Appeals' opinion is further bolstered by its examination of congressional intent, which strongly supported its position of exclusive federal jurisdiction. Pursuant to Pub. L. 83-280 (18 U.S.C. §1162; 25 U.S.C. §1321), Congress had granted certain states (Alaska, California, Minnesota, Nebraska, Oregon and Wisconsin) the power to assume jurisdiction of criminal and civil offenses committed on Indian reservations. It also allowed the assumption of Indian jurisdiction by any other states that desired to do so. To receive such jurisdiction, the state just had to say "yes" through affirmative legislation. Congress further consented to allow required amendment of any state constitution that contained disclaimers of jurisdiction over Indian lands, such as the Arizona Enabling Act. Arizona did not avail itself of this opportunity. Indeed, Arizona specifically declined. See generally Clinton, Criminal Jurisdiction Over Indian Lands: A Journey through a Jurisdictional Maze, 18 Ariz. L. Rev. 503 (1979). Arizona, in short, made an affirmative decision not to exercise jurisdiction

over Indian lands.

Against this background, Arizona now lamely suggests that this Court should carve out an exception to exclusive federal jurisdiction which permits concurrent state jurisdiction because of a purported lack of federal and tribal interest when a non-Indian offender commits a crime against an Indian on the reservation. The state looks to United States v. McBratney, 104 U.S. 621 (1882), which, as stated above, concerns non-Indians committing crimes against other non-Indians. McBratney in an anomaly to exclusive federal jursidiction on Indian reservations because it involved soellyy non-Indians. That is not the case here, where there are Indian victims. The state attempts to finesse this by arguing that Indian and federal interests are not impinged. In so arguing, the state's attempted prosecutorial reach outstrips its jurisdictional grasp.

In the present case, both the Indian tribe and the federal government have a very strong interest in maintaining jurisdiction. The defendant is charged with sexual crimes against Indian youths, which surely is an Indian matter. Moreover, as noted in Williams, federal jurisdiction is especially applicable "with respect to crimes committed by white men against the persons or property of Indian tribes while occupying reservations . . . ." 327 U.S. at 714. Indeed, the strong federal interest has led to a federal prosecution of respondent which has resulted in a conviction and a lengthy federal prison sentence. There is, therefore, no true state interest that needs vindication.

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Essentially Arizona wishes to oust exclusive federal jurisdiction over reservations for non-Indians committing crimes against Indians for the simple fact that it feels that respondent should be punished even more. This is not a valid reason for the granting of certiorari.

CONCLUSION

Because the Arizona Court of Appeals' decision in this case is neither in conflict with existing federal law nor with the decision of this Court nor those of the federal circuit courts and, further, because the Arizona Court of Appeals' decision conforms with stated tribal and federal interest in exclusive criminal jurisdiction over non-Indians committing crimes against Indians on the reservation, the State of Arizona's Petition for Writ of Certiorari should be denied.

Respectfully submitted: November 14, 1988

FREDRIC F. KAY
Federal Public Defender
District of Arizona

FREDRIC F. KAY
Federal Public Defender

JON M. SANDS
Asst. Federal Public Defender

CERTIFICATE OF MAILING - DELIVERY

STATE OF ARIZONA)
) ss:
County of Maricopa)

JON M. SANDS, Assistant Federal Public Defender, District of Arizona, Phoenix, Arizona, being first duly sworn, upon his oath, deposes and says:

That two copies of Brief in Opposition to Petition for Writ of Certiorari to the Arizona Court of Appeals have this 14th day of November, 1988, been mailed to Paul J. McMurdie, Assistant Attorney General, Department of Law, 1275 West Washington, Phoenix, Arizona 85007; and a copy mailed to Conrad Flint, Reg. No. 20008-008, FCI, Sandstone, Minnesota 55072.

JON M. SANDS
Asst. Federal Public Defender

SUBSCRIBED AND SWORN to before me this 14th day of November, 1988, by Jon M. Sands.

Notary Public

My Commission Expires:
My Commission Expires June 6, 1990

APPENDIX

these sources, but may extend to the entire record to determine what defendant "knew from any source." *Crowder*, 155 Ariz. at 479, 747 P.2d 1178. *Crowder* further establishes that *Phillips* violations are not properly addressed for the first time on appeal, but rather should be submitted to the trial court by a petition for post-conviction relief. *Crowder*, at 479, 747 P.2d at 1178; *see* Rule 32.1, Arizona Rules of Criminal Procedure.

Accordingly, pursuant to *Crowder*, we retract our initial determination to vacate the judgment and sentence of the trial court. Instead, we affirm the trial court's judgment and sentence, leaving it to the defendant to pursue the restitution issue by petition for post-conviction relief if he so chooses.

Affirmed.

CONTRERAS, P.J., and GREER, J., concur.

157 Ariz. 227

STATE of Arizona, Appellant,

v.

Conrad Marion FLINT, Appellee.

No. 1 CA–CR 10650.

Court of Appeals of Arizona,
Division 1, Department B.

Jan. 19, 1988.

Review Denied July 2, 1988.

Non-Indian was indicted of oral sexual conduct with and commercial exploitation of Indian minors on reservation. The Superior Court, Navajo County, Cause Nos. CR–9095 and CR–9129, John L. Claborne, J., dismissed indictments. State appealed. The Court of Appeals, Greer, J., held that State lacked criminal jurisdiction over crimes that non-Indian allegedly committed against Indians on reservation.

Affirmed.

Indians ⇐38(2)

State lacked criminal jurisdiction over crimes that non-Indian allegedly committed against Indians on reservation, but federal jurisdiction was exclusive. 18 U.S.C.A. §§ 1152, 1153, 1162; A.R.S. Const. Art. 20, par. 4; 28 U.S.C.A. § 1360.

Robert K. Corbin, Atty. Gen. by William J. Schafer III, Chief Counsel, Crim. Div., and Paul J. McMurdie, Asst. Atty. Gen., Phoenix, for appellant.

David J. Martin, Navajo County Public Defender, Holbrook, for appellee.

OPINION

GREER, Judge.

Appellee Flint was charged by indictment in Navajo County with four counts of oral sexual contact with a minor and four counts of commercial sexual exploitation of a minor. In a separate indictment, he was charged with six counts of oral sexual contact with a minor and two counts of commercial sexual exploitation of a minor. Since the jurisdiction issue was not raised at trial by either party, the trial judge requested memoranda and oral argument. On July 30, 1986, the court heard oral argument on the issue of jurisdiction and, on August 7, 1986, ruling that it did not have jurisdiction, ordered dismissal of both indictments. The state filed a timely notice of appeal from the dismissal.

The only question the state raises on appeal is whether the trial court erred by dismissing the action on the grounds that the state court has no criminal jurisdiction where a non-Indian allegedly commits a crime against an Indian on the reservation. The state does not deny federal jurisdiction, but argues, without supporting authority, that the state and federal courts have concurrent jurisdiction. Defendant, on the other hand, argues that federal jurisdiction is exclusive. We agree with defendant's position.

The Indian Country Crimes Act, 18 U.S.C. § 1152, provides:

> Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country.
>
> This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively.

The terms of this act include all offenses by non-Indians in Indian country. *See* F. Cohen, *Handbook of Federal Indian Law* 298 (1982 ed.) (Cohen). The United States Supreme Court carved out an exception to 18 U.S.C. § 1152 for offenses committed by non-Indians against non-Indians within Indian country. *United States v. McBratney*, 104 U.S. (14 Otto) 621, 26 L.Ed. 869 (1881). However, criminal offenses by non-Indians against Indians or their property remain subject to federal jurisdiction pursuant to the Indian Country Crimes Act. "The Supreme Court has stated that federal court jurisdiction under this Act is exclusive of state court jurisdiction." Cohen, at 353, *citing Williams v. Lee*, 358 U.S. 217, 220 n. 5, 79 S.Ct. 269, 270 n. 5, 3 L.Ed.2d 251 (1959); *Williams v. United States*, 327 U.S. 711, 714, 66 S.Ct. 778, 779–80, 90 L.Ed. 962 (1946).

> The general rule *outside Indian affairs* is that the state and federal governments may separately punish the same conduct. *Abbate v. United States*, 359 U.S. 187 [79 S.Ct. 666, 3 L.Ed.2d 729] (1959). In certain areas Congress has preempted state jurisdiction. *E.g., Pennsylvania v. Nelson*, 350 U.S. 497 [76 S.Ct. 477, 100 L.Ed. 640] (1956). *Indian affairs has long been an area of broad federal preemption, see* [Cohen, Ch. 5, Sec. B] and that factor alone is sufficient to conclude that the states cannot punish Indian defendants in Indian country. *See United States v. Kagama*, 118 U.S. 375 [6 S.Ct. 1109, 30 L.Ed. 228] (1886). When a defendant is not Indian, traditional law from other fields might suggest that concurrent state and federal jurisdiction exists. But this traditional assumption is based on the typical situation where the state and federal governments seek to vindicate distinct governmental interests. The assumption has not been tested where both governments might seek to punish the same common law felony; in those circumstances, concurrent jurisdiction would be particularly troublesome. The potential for this problem arises in federal enclaves under concurrent jurisdiction. *See United States v. State Tax Comm'n*, 412 U.S. 363 [93 S.Ct. 2183, 37 L.Ed.2d 1] (1973). Congress is aware of this problem, and current drafts of a revised federal criminal code propose that federal court jurisdiction over concurrent enclaves would be deemed preemptive over common law felonies but not other crimes. *See* S. 1722, 96th Cong., 2d Sess. § 206 (1979). These considerations suggest that the exclusive jurisdiction ... is correct, but there may be concurrent state jurisdiction over a non-Indian defendant when there are victims of both races or in the class of "victimless" cases ...

Cohen, at 353 n. 44 (emphasis added).

In *Williams v. United States*, 327 U.S. 711, 714, 66 S.Ct. 778, 780, 90 L.Ed. 962 (1946), a non-Indian man was accused of having sexual intercourse with an underage Indian girl on the reservation; the United States Supreme Court preliminarily noted:

> While the laws and courts of the State of Arizona may have jurisdiction over offenses committed on this reservation between persons who are not Indians, *the laws and courts of the United States, rather than those of Arizona, have jurisdiction over offenses committed there, as in this case, by one who is not an Indian against one who is an Indian.*

(Emphasis added.)

The state suggests that this language is mere dicta, unnecessary to sustain the

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judgment of the court. *Arizona Corp. Comm'n v. Mountain States Tel. & Tel. Co.*, 71 Ariz. 404, 228 P.2d 749 (1951). In *Williams*, the United States Supreme Court had to consider its own jurisdiction, but it did not have to consider whether Arizona and the federal courts had concurrent jurisdiction. While the language of *Williams* may have been dicta, it has not been seriously questioned. Cohen, at 353.

Williams cited *Donnelly v. United States*, 228 U.S. 243, 33 S.Ct. 449, 57 L.Ed. 820 (1913), which held that federal courts have jurisdiction where a non-Indian kills an Indian on a reservation within state boundaries, as the basis for the above-quoted proposition. *Donnelly* emphasized the protective purpose of federal jurisdiction and, in turn, cited *United States v. Kagama*, 118 U.S. 375, 383, 6 S.Ct. 1109, 1113, 30 L.Ed. 228 (1886), which found exclusive federal jurisdiction where both the defendant and the victim were Indian because "the Indian tribes are the wards of the nation." *Donnelly* held that the ward rationale supporting exclusive federal jurisdiction applied "perhaps *a fortiori*—with respect to crimes committed by white men against the person or property of the Indian tribes while occupying reservations set apart for the very purpose of segregating them from the whites and others not of Indian blood." 228 U.S. at 271–72, 33 S.Ct. at 459.[1]

Learned commentators on Indian law have also supported the result reached here. Cohen, at 298, states that *Donnelly* has consistently been followed and exclusive federal jurisdiction obtains where a non-Indian harms an Indian. Clinton, *Criminal Jurisdiction over Indian Lands: A Journey through a Jurisdictional Maze*, 18 Ariz.L.Rev. 503, 523 n. 94 (1976), noted that "[t]he prevailing rule today is that the federal jurisdiction conferred by [U.S.C.] sections 1152 and 1153 is exclusive; where one of these sections applies, the state has no jurisdiction."

Two recent federal court of appeals cases specifically state that federal criminal jurisdiction is exclusive over crimes committed in Indian country affecting an Indian as either the defendant or victim. In *United States v. Torres*, 733 F.2d 449 (7th Cir.), *cert. denied*, 469 U.S. 864, 105 S.Ct. 204, 83 L.Ed.2d 135 (1984), the defendant Indians were charged with the murder of a non-Indian. The defendants argued that the conspiracy to commit the murder and kidnapping occurred on state land; therefore, jurisdiction lay in state court. The Seventh Circuit Court disagreed.

> It is equally clear, however, that *under 18 U.S.C. § 1152, the federal court has exclusive jurisdiction* to punish an Indian who participates in a conspiracy to murder a non-Indian within the federal territory of the Menominee Indian Reservation, provided that the Indian has not been punished by the tribe and the crime is not in the exclusive jurisdiction of the tribe....

733 F.2d at 459 (emphasis added).

Langley v. Ryder, 778 F.2d 1092 (5th Cir.1985), generally held:

> *Once land is determined to be Indian country, state criminal jurisdiction is preempted by both federal protection of tribal self-government and federal statutes on subjects relating to Indians, tribes, their property and federal programs* [citation omitted]. Federal protection of tribal self-government precludes criminal jurisdiction of state courts over Indians on their property absent the consent of Congress. [Citation omitted.] *In order for a state to exercise criminal jurisdiction within Indian country there must be clear and unequivocal grant of that authority.*

1. There is little case law on the subject, probably because the issue has been thought to be well-settled. In several cases involving Indians or Indian reservations where there has been a question of jurisdiction, the courts have noted the general scheme for criminal jurisdiction over crimes committed on the reservation and have stated that, absent federal law to the contrary, where non-Indians commit crimes against Indians on a reservation, they are subject to *federal* jurisdiction. *E.g., Mull v. United States*, 402 F.2d 571 (9th Cir.1968); *United States v. John*, 587 F.2d 683, 686 (5th Cir.1979); *United States v. Johnson*, 637 F.2d 1224 (9th Cir.1980).

778 F.2d at 1095–96 (emphasis added). The Fifth Circuit Court noted that, pursuant to Pub.L. 83–280 (25 U.S.C. § 1321), Congress granted certain states the power to exercise criminal jurisdiction within Indian land, but held that, because "Louisiana is not a P.L. 280 state, there is no effective Congressional grant of jurisdiction to Louisiana within Indian country. Thus the general rule that the federal, not the state government, has criminal jurisdiction over Indian lands applies." *Id.* at 1096.

We find the cases discussing state criminal jurisdiction pursuant to acts of Congress or Pub.L. 83–280 persuasive. Pub.L. 83–280 specifically grants certain states broad criminal jurisdiction over offenses committed by or against Indians on Indian land within state boundaries. *See* 18 U.S.C. § 1162(a) (Alaska, California, Minnesota, Nebraska, Oregon and Wisconsin were expressly granted criminal jurisdiction over offenses committed within specified Indian country). Congress has also made separate grants of state criminal jurisdiction to individual states. For example, 18 U.S.C. § 3243 specifically authorized Kansas to have concurrent criminal jurisdiction with the federal courts over Indian reservations in that state. *See Iowa Tribe of Indians v. Kansas*, 787 F.2d 1434 (10th Cir.1986). *See also, California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 107 S.Ct. 1083, 94 L.Ed.2d 244 (1987); *State v. Hoodie*, 588 F.2d 292 (9th Cir.1978); *Arquette v. Schneckloth*, 56 Wash.2d 178, 351 P.2d 921 (1960).

Pub.L. 83–280 further allowed unnamed states to assume criminal jurisdiction over Indian lands within their borders if they met certain requirements and obtained the consent of the tribe over which they desired jurisdiction. Pub.L. 90–284, Title IV, § 401, Apr. 11, 1968, 82 Stat. 78; *Langley v. Ryder*, 733 F.2d at 1096. Section 6 of the Act of Aug. 15, 1953, c. 505, 67 Stat. 590 [Pub.L. 83–280], provided that:

> [n]otwithstanding the provisions of any Enabling Act for the admission of a State, the consent of the United States is hereby given to the people of any State to amend, where necessary, their State constitution or existing statutes, as the case may be, to remove any legal impediment to the assumption of civil and criminal jurisdiction in accordance with the provisions of this Act [adding section 1360 of this title and section 1162 of Title 18]: Provided, That the provisions of this Act shall not become effective with respect to such assumption of jurisdiction by any such State until the people thereof have appropriately amended their State constitution or statutes as the case may be.

In Section 7, Congress gave consent to any other state not having criminal and/or civil jurisdiction to assume jurisdiction at the time and in the manner the people of that state, by legislative action, obligate and bind the state to do so.[2]

Section 20 of Arizona's Enabling Act, Act June 20, 1910, c. 310, 36 Stat. 557, 568–579, provides in pertinent part:

> [t]hat the people inhabiting said proposed State do agree and declare that they forever disclaim all right and title to the unappropriated and ungranted public lands lying within the boundaries thereof and to all lands lying within said boundaries owned or held by an Indian or Indian tribes, the right or title to which shall have been acquired through or from the United States or any prior sovereignty, and that until the title of such Indian or Indian tribes shall have been extinguished the same shall be and remain subject to the disposition and under the

2. That part of Pub.L. 83–280 which permitted assumption of civil and/or criminal jurisdiction by states not having such was repealed by Pub. L. 90–284, Title IV, § 403(b), Apr. 11, 1968, 82 Stat. 79. This repeal was not to affect any cession of jurisdiction made pursuant to 18 U.S.C. § 1162 (criminal jurisdiction) or 28 U.S.C. § 1360 (civil jurisdiction) prior to repeal. However, the repeal did close the door on any subsequent cession of civil or criminal jurisdiction to the states under either statute. *See also, Langley v. Ryder*, 602 F.Supp. 335, 344 (W.D.La.), *aff'd*, 778 F.2d 1092 (5th Cir.1985).

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absolute jurisdiction and control of the Congress of the United States; ...

Ariz. Const. art. 20, para. 4, adopts virtually identical language.[3]

Under A.R.S. § 36-1801, Arizona has assumed jurisdiction over Indian lands pursuant to Pub.L. 83-280 for the limited purpose of enforcing air pollution control laws.[4] However, Congress has not made an express grant of state criminal jurisdiction over the Navajo reservation,[5] nor has the state assumed such jurisdiction in accordance with Pub.L. 83-280. Moreover, the time for the state to assume either civil or criminal jurisdiction has passed.[6] Consequently, it would be inappropriate for this court to redefine Arizona's criminal jurisdiction when such jurisdiction is obviously a matter of federal legislative concern.

The United States Supreme Court held that 18 U.S.C. § 1153, which allocates jurisdiction between the federal and tribal courts in cases of crimes between Indians on Indian land, does not allow for concurrent state jurisdiction in such cases. *United States v. John*, 437 U.S. 634, 98 S.Ct. 2541, 57 L.Ed.2d 489 (1978). If concurrent state jurisdiction does not exist under 18 U.S.C. § 1153, it seems likely that a similar result should obtain under 18 U.S.C. § 1152.

State v. Burrola, 137 Ariz. 181, 669 P.2d 614 (App.1983), can be distinguished and is of no aid to the state. In *Burrola*, this court found that the state had jurisdiction where a non-Indian committed a victimless crime on the Indian reservation. The court first noted the long-established exception to exclusive federal jurisdiction which provides for exclusive state jurisdiction over crimes committed by non-Indians against non-Indians, even though on the reservation. *McBratney*, 104 U.S. (14 Otto) 621; *State v. Griswold*, 101 Ariz. 577, 578, 422 P.2d 693, 694 (1967). The rationale for this exception is that such crimes do not involve essential tribal relations or affect the rights of Indians. *Burrola*, 137 Ariz. at 182, 669 P.2d at 615. This court found the same reasoning applicable where a non-Indian commits a victimless crime on an Indian reservation.

By contrast, in a situation such as this, both the Indian tribe and the federal government, which acts as the Indians' guardian, have a very strong interest. The appellee here is charged with serious sexual crimes against several young Indian males, thus creating a strong tribal interest. In this respect, this case is similar to *Williams v. United States*, 327 U.S. 711, 66 S.Ct. 778, 90 L.Ed. 962, where the non-Indian defendant was charged with having sexual contact with an underage Indian female. Further, in *Williams*, the court noted that federal jurisdiction was especially applicable "with respect to crimes committed by white men against the persons or property of Indian tribes while occupying reservations...." 327 U.S. at 714, 66 S.Ct. at 780, *citing Donnelly*, 228 U.S. 243, 33 S.Ct. 449.

3. Article I of the treaty between the United States Government and the Navajo Indian Tribe also provides.

> If bad men among the whites, or among other people subject to the authority of the United States, shall commit any wrong upon the person or property of the Indians, the United States will, upon proof made to the agent and forwarded to the Commissioner of Indian Affairs at Washington City, proceed at once to cause the offender to be arrested and punished according to the laws of the United States, and also to reimburse the injured persons for the loss sustained.

Treaty of 1868, August 12, 1868, art. I, 15 Stat. 667; Navajo Trib.Code, App., at 9 (1978). *Cf. United States v. Superior Court In & For Maricopa County*, 144 Ariz. 265, 697 P.2d 658 (1985).

4. Section 36-1801 was renumbered as A.R.S. § 49-561 by Laws 1986, ch. 368, § 39, effective July 1, 1987.

5. Congress has expressly given Arizona criminal and civil jurisdiction over the Pascua Yaqui Indian reservation. 25 U.S.C. § 1300f(c). However, it is not clear whether such delegation is still effective in the face of the Arizona Governor's attempted retrocession of jurisdiction and Ariz. Const. art. 20, para. 4, which disclaims any jurisdiction over Indians or their land. *See Val/Del, Inc. v. Superior Court*, 145 Ariz. 558, 564 n. 2, 703 P.2d 502, 508 n. 2 (App.1985).

6. *See* note 2, *supra*.

We conclude the state has no jurisdiction in this case. The trial court's order dismissing the state's prosecution is affirmed.

CONTRERAS, P.J., and FIDEL, J., concur.

157 Ariz. 232

Jeffrey A. WEINER and Barbara S. Weiner, husband and wife; and Merton B. Weiner and Jean Weiner, husband and wife, Plaintiffs/Appellees/Cross-Appellants,

v.

Steven Perry ASH and Christine L. Ash, husband and wife, Defendants/Appellants/Cross-Appellees.

No. 2 CA-CV 87-0195.

Court of Appeals of Arizona, Division 2, Department B.

Jan. 21, 1988.

Reconsideration Denied March 7, 1988.

Petition and Cross-Petition for Review Denied July 6, 1988.*

In action arising out of shooting, the Superior Court, Pima County, Michael Brown, J., awarded victim and passenger in his car at time of shooting damages and ordered that defendant undergo psychiatric treatment. Parties appealed. The Court of Appeals, Livermore, P.J., held that: (1) award of damages for future emotional distress and anxiety was invalid; (2) court lacked authority to compel defendant to undergo psychiatric treatment; and (3) plaintiffs were not entitled to damages for lost profits from real estate speculation.

Affirmed in part, reversed in part, and remanded.

1. **Damages** ⇐49.10

Award to shooting victim and passenger in car he was driving at time of shooting of damages for future emotional distress and anxiety, conditioned upon defendant's failure to comply with court-ordered psychiatric treatment, was invalid as award of compensation for probable future damages.

2. **Mental Health** ⇐512

Trial court in action for civil assault lacked authority to compel defendant, who had been found not guilty of criminal assault charge by reason of insanity, to undergo psychotherapy, take medication, and undergo urinalysis, and to require posting of bond to insure defendant's compliance with court-ordered treatment. A.R.S. §§ 36-533 to 36-544.

3. **Damages** ⇐190

Shooting victim and passenger of vehicle he was driving at time of shooting were not entitled to award of damages for lost profits from real estate speculation for six to eight-month period after shooting when parties were indisposed to return to business; evidence that parties made several advantageous real estate transactions before shooting, that several other people had made advantageous transactions in months after shooting, and that parties had resources to have made similar transactions had they been disposed to do so, was speculative and insufficient to support award of damages.

Miller & Pitt by Richard L. McAnally and Eugene N. Goldsmith, Tucson, for plaintiffs/appellees/cross-appellants.

Kimble, Gothreau, Nelson & Cannon by William Kimble and Daryl A. Audilett, Tucson, for defendants/appellants/cross-appellees.

OPINION

LIVERMORE, Presiding Judge.

Defendant Steven Ash shot and wounded plaintiff Jeffrey Weiner. Plaintiff Merton

* Feldman, V.C.J., of the Supreme Court, was recused and did not participate.

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Supreme Court, U.S.
FILED
JUN 5 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-603

In the Supreme Court of the United States

OCTOBER TERM, 1988

STATE OF ARIZONA, PETITIONER

v.

CONRAD MARION FLINT

ON PETITION FOR A WRIT OF CERTIORARI TO THE ARIZONA COURT OF APPEALS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether the State of Arizona has jurisdiction, concurrent with that of the United States under 18 U.S.C. 1152, to prosecute a non-Indian for a crime committed against an Indian on the Navajo Indian Reservation in Arizona.

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In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-603

STATE OF ARIZONA, PETITIONER

v.

CONRAD MARION FLINT

ON PETITION FOR A WRIT OF CERTIORARI TO THE ARIZONA COURT OF APPEALS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

This brief is filed in response to the Court's invitation to the Solicitor General to file a brief expressing the views of the United States.

STATEMENT

1. On May 14, 1986, a state grand jury in Navajo County, Arizona, returned an indictment charging respondent with six counts of sexual conduct with a minor and two counts of commercial sexual exploitation of a minor. Pet. App. A2. On June 18, 1986, a different grand jury indicted respondent on four additional counts. The indictments and grand jury testimony charged that respondent, a non-Indian school teacher employed by Navajo County to teach Indian children, took nude photographs and videotapes of male Indian children while they were engaged in various sexual acts with him and with each other. *Id.* at C2-C3. On August 7, 1986, the Superior Court, *sua sponte,* dismissed both indictments on the ground that the State lacked jurisdiction over crimes committed by non-Indians against Indians on the Navajo Reservation. *Id.* at C1-C11.

2. Although the State does not mention the point in its petition, the United States brought charges against respondent under 18 U.S.C. 1152 for engaging in sexual conduct with a minor. Section 1152 provides that, "[e]xcept as otherwise expressly provided by law, the general laws of the United States as to punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to Indian country." In charging respondent under 18 U.S.C. 1152, the United States invoked the Assimilative Crimes Act, 18 U.S.C. 13, which incorporates state substantive law as federal law for offenses committed on federal enclaves where Congress has not made the conduct punishable under a specific federal statute. The United States charged respondent, through 18 U.S.C. 13, with violating the same state statutes on which the state charges were brought. Ariz. Rev. Stat. §§ 13.604.01(a), 13.1401, 13.1405 (1978 & Supp. 1988).

Respondent pleaded guilty in federal court to one count charging sexual conduct with the child who was the victim of the acts charged in one of the state indictments. *United States* v. *Flint,* No. CR 86-286 PHX EHC (D. Ariz.). Paragraph 3 of the plea agreement stated that the United States would not prosecute respondent for any other incidents of sexual conduct with a minor occurring prior to his arrest on May 10, 1986, and that the State would not prosecute him for any charges in the state indictments. The district court told respondent that it had no jurisdiction over the State and that if the State decided to prosecute him, that action would not provide a basis for withdrawal of his plea to the *federal* charge. *United States* v. *Flint,* 10/6/86 Tr. 15-18. The court then asked respondent whether he wanted to proceed with his plea, and respondent stated that he did (*id.* at 18). Respondent was sentenced to 20 years' imprisonment on the federal conviction.

3. In the meantime, the State had appealed the Superior Court's dismissal of the state indictments. In an opinion dated January 19, 1988, the Arizona Court of Appeals affirmed the dismissal, concluding that federal jurisdiction under 18 U.S.C. 1152 is exclusive (Pet. App. A1-A21).

DISCUSSION

If the Court were writing on a clean slate, it might conclude that federal jurisdiction under Section 1152 is not exclusive and that Arizona therefore has jurisdiction over offenses committed by non-Indians against Indians in Indian country. The State has a strong interest in enforcing its criminal laws against non-Indians, and state jurisdiction would not necessarily interfere with federal or tribal interests.

The Court, however, is not writing on a clean slate. The statutory provision now codified in 18 U.S.C. 1152 was enacted at a time when States had no jurisdiction over Indian reservations within their borders. The shared assumption of the three Branches after that time was that federal jurisdiction under 18 U.S.C. 1152 is exclusive and that the States do not have jurisdiction over offenses by non-Indians against Indians. This Court has so stated on several occasions and the Executive and Legislative Branches have acted on that assumption several times, in supporting and enacting legislation concerning state jurisdiction on Indian reservations. Consistent with this understanding, the highest courts of Montana, North Dakota, and Oklahoma, like the Arizona Court of Appeals in this case, have held that the States are without jurisdiction over offenses committed by non-Indians against Indians in Indian country. Other state courts have expressed a similar view. In light of this background, and in light of the fact that respondent has already been prosecuted in federal court on related charges, we submit that there is no compelling reason for the Court to grant review in this case.

1. The second paragraph of 18 U.S.C. 1152 explicitly excepts from its coverage offenses committed by one Indian against the person or property of another Indian. Those offenses are left exclusively to tribal jurisdiction, except for "major crimes" by Indians that are subject to federal jurisdiction under 18 U.S.C. 1153. In addition, in *United States* v. *McBratney*, 104 U.S. 621 (1882), this Court held that crimes by non-Indians against other non-Indians were implicitly excluded from Rev. Stat. § 2145 (1878 ed.), the predecessor to 18 U.S.C.

1152. The Court acknowledged that Rev. Stat. § 2145 applied to such crimes prior to statehood (104 U.S. at 623; see also *New York ex rel. Ray* v. *Martin,* 326 U.S. 496, 500 & n.5 (1946)), but it held that the Act admitting Colorado to the Union implicitly repealed Rev. Stat. § 2145 insofar as it applied to offenses by non-Indians against non-Indians and vested such jurisdiction in the State (104 U.S. at 623-624). The Court stressed, however, that *McBratney* presented no question "as to the punishment of crimes committed by or against Indians" (*id.* at 624). Accord *Draper* v. *United States,* 164 U.S. 240 (1896); *New York ex rel. Ray* v. *Martin, supra.* See also *United States* v. *Wheeler,* 435 U.S. 313, 325 n.21 (1978); *United States* v. *Antelope,* 430 U.S. 641, 643 n.2 (1977).

As a result of these exceptions, Section 1152 is confined to "interracial" crimes—*i.e.,* crimes committed either by or against Indians. In *Donnelly* v. *United States,* 243 U.S. 259 (1913), the Court rejected an attempt to narrow the scope of Section 1152 still further to exclude crimes *against* Indians by non-Indians. The defendant argued that under the rationale of *McBratney,* California's admission to the Union conferred on the State the "undivided authority to punish crimes committed upon * * * an Indian reservation, excepting crimes committed by the Indians." 228 U.S. at 271. The Court concluded, however, that "offenses committed by or against Indians are not within the principle of * * * *McBratney.*" *Ibid.* The Court observed that "[t]his was in effect held as to crimes committed *by* the Indians" in *United States* v. *Kagama,* 118 U.S. 375, 383-384 (1886), which sustained federal jurisdiction under the Major Crimes Act over crimes by Indians in Indian country on the ground that the Indians are wards of the Nation and in need of its protection. 228 U.S. at 271 (emphasis added). The Court concluded that "[t]his same reason applies—perhaps *a fortiori*—with respect to crimes committed by white men against the persons or property of the Indian tribes while occupying reservations set apart for the very purpose of segregating them from the whites and others not of

Indian blood." *Id.* at 272.[1]

Under *Donnelly*, the United States had jurisdiction under Section 1152 to prosecute respondent for the conduct at issue here. The question, then, is whether Arizona has concurrent jurisdiction to prosecute him as well. As the court of appeals observed (Pet. App. A10-A12), it is settled that federal jurisdiction under 18 U.S.C. 1152 (or 1153) over crimes committed *by* Indians is exclusive. *United States* v. *John*, 437 U.S. 634, 651 (1978); *Seymour* v. *Superintendent*, 368 U.S. 351, 359 (1962); *Williams* v. *Lee*, 358 U.S. 217, 220 n.5 (1959); *Arquette* v. *Schneckloth*, 56 Wash. 2d 178, 351 P.2d 921 (1960); *Application of Denetclaw*, 83 Ariz. 299, 320 P.2d 697 (1958); *State* v. *Campbell*, 53 Minn. 354, 55 N.W. 553 (1893). This rule protects the Indians from the possibility of prejudice in state courts, and thus is an expression of the federal duty to protect the Indians. Arizona argues that in the converse situation, involving crimes committed *against* Indians, there should be a different rule, permitting the State to exercise concurrent jurisdiction. Although there is much to commend such a rule as a matter of policy, it encounters substantial obstacles.

2. a. In deciding whether state law may be applied to the on-reservation conduct of non-Indians in matters affecting Indians, this Court, in the absence of a governing Act of Congress, undertakes a " 'particularized examination of the relevant state, federal, and tribal interests.' " *Cotton Petroleum Corp.* v. *New Mexico*, 109 S. Ct. 1698, 1707 (1989), quoting *Ramah Navajo School Bd.* v. *Bureau of Revenue*, 458 U.S. 832, 838 (1982). The Court "examine[s] the language of the relevant treaties and statutes in terms of both the broad policies that underlie them and the notions of sovereignty that have developed from historical traditions of tribal independence." *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136, 144-145 (1980); see also *Cotton Petroleum*, 109 S. Ct. at 1707;

[1] Federal convictions of non-Indians for crimes against Indians in Indian country were subsequently sustained in *United States* v. *Pelican*, 232 U.S. 442 (1914); *United States* v. *Ramsey*, 271 U.S. 467 (1926); *United States* v. *Chavez*, 290 U.S. 357 (1933); and *Williams* v. *United States*, 327 U.S. 711 (1946).

Three Affiliated Tribes of the Fort Berthold Reservation v. *Wold Engineering, P.C.*, 476 U.S. 877, 884 (1986) (*Three Affiliated Tribes II*). If the Court were to weigh the respective tribal, federal, and state interests in that general manner here, a strong argument could be made for permitting the State to exercise jurisdiction.

In *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191 (1978), the Court held that Indian tribes do not have criminal jurisdiction over non-Indians. State jurisdiction over offenses committed by non-Indians against Indians therefore would not interfere with any tribal jurisdiction over the same subject matter. Indeed, this Court observed in *Three Affiliated Tribes of the Fort Berthold Reservation* v. *Wold Engineering, P.C.*, 467 U.S. 138, 149 (1984) (*Three Affiliated Tribes I*), that "[t]he exercise of state jurisdiction is particularly compatible with tribal autonomy when * * * the tribal court lack[s] jurisdiction over the claim at the time the suit [is] instituted." Nor would state jurisdiction appear to have a significant impact on tribal autonomy and self-government as to those subjects over which the Tribe does have jurisdiction—principally its own members and territory.

The United States of course has a duty under 18 U.S.C. 1152, as well as Article I of the Treaty of June 1, 1868, between the United States and the Navajo Tribe (15 Stat. 667), to protect the Indians on the Reservation against crimes committed by non-Indians. But recognition of concurrent state jurisdiction would not be incompatible with that duty. In fact, it may well be that concurrent state jurisdiction would facilitate effective law enforcement on the Reservation, and thereby further the federal and tribal interests in protecting Indians and their property against the actions of non-Indians.[2] Federal investigative

[2] In other contexts, the Court has indicated that a State may enforce its own laws intended for the protection of the Indians, effectively supplementing federal efforts. See *Rice* v. *Rehner*, 463 U.S. 713, 723 & nn.9, 10 (1983) (prohibitions against introducing liquor into Indian country); *New York* v. *Dibble*, 62 U.S. (21 How.) 366 (1859) (exercise by state courts of equitable jurisdiction barring non-Indians from entering Indian lands).

agents, prosecutors, and courts often are much farther from the scene of an on-reservation crime than are their state and local counterparts. This distance also imposes a burden on victims and witnesses. In part for these reasons, the Civil Rights Commission has questioned the adequacy of the federal response to reservation crimes committed by non-Indians against Indians. U.S. Comm'n on Civil Rights, *Indian Tribes: A Continuing Quest for Survival* 175-176 (1981).

To the extent that the rationale for exclusive federal jurisdiction under 18 U.S.C. 1152 and 1153 over crimes committed *by* Indians is the potential for prejudice against Indians in the state courts and law enforcement agencies, a similar prejudice might operate against Indian victims, and thereby in favor of non-Indian defendants accused of committing offenses against them. But if state authorities declined to prosecute a non-Indian for a crime against an Indian for that (or any other) reason—or if the non-Indian defendant was acquitted in state court—the United States would be free to bring charges based on the same conduct to vindicate the distinct federal interest in protecting the Indians. *Abbate* v. *United States,* 359 U.S. 187 (1959).

Finally, the State has a legitimate interest in enforcing its criminal laws against non-Indians, even on an Indian reservation—at least where there is no interference with federal and tribal interests. Moreover, where jurisdiction is properly assumed, a State has a legitimate interest in furnishing protection to its Indian citizens, just as it furnishes them with other benefits, such as access to state courts in civil cases. See *Three Affiliated Tribes I; Three Affiliated Tribes II.*

b. Largely for the foregoing reasons, the Office of Legal Counsel concluded in a 1979 opinion that, although the question was "exceedingly difficult," a "substantial case" could be made that the States should not be deprived of jurisdiction over offenses committed by non-Indians against Indians. 3 Op. Off. Legal Counsel 111, 117, 120 (1979).[3] Based on OLC's analysis, an insertion was included in the United States Attorneys' Man-

[3] The OLC opinion principally concerned jurisdiction over "victimless" crimes.

ual in 1980, which concluded that although the question was "difficult," the States do have concurrent jurisdiction over such offenses. *United States Attorneys' Manual* § 9-20.215 (1985).[4]

3. We have now reexamined the jurisdictional issue in response to the Court's invitation in this case. Especially in light of considerations that were not addressed in the OLC opinion or the United States Attorneys' Manual, we are of the view that the argument in favor of state jurisdiction is more difficult than it appeared to this Department in 1979 and 1980. In particular, we believe that Arizona's submission in this case places too much emphasis on general principles of preemption that apply in the absence of a governing Act of Congress. The fact is that Congress has passed two statutes that specifically address the subject of jurisdiction over offenses committed by non-Indians against Indians in Indian country: 18 U.S.C. 1152 and Public Law 280 (Act of Aug. 15, 1953, ch. 505, 67 Stat. 588, codified as amended at 18 U.S.C. 1162, 25 U.S.C. 1321-1326, and 28 U.S.C. 1360). The relevant question is whether those statutes, not general principles of preemption standing alone, permit Arizona to exercise jurisdiction over such offenses. See *Kennerly* v. *District Court,* 400 U.S. 423, 424 n.1, 427 (1971). As we explain below, the text, background, and interpretation of both statutes indicate that they do not.

a. This Court has stated on three occasions, albeit in dicta, that in the absence of authorization by Congress, the States do not have jurisdiction over offenses committed by non-Indians against Indians in Indian country. In the first of those cases, *Williams* v. *United States,* 327 U.S. 711 (1946), a non-Indian man was charged with having sexual intercourse with an underage Indian girl on an Indian reservation. Although no jurisdictional claim was raised, the Court, in describing the statutory regime governing the reservation, stated: "While the laws and courts of the State of Arizona may have jurisdiction over offenses committed on [the] reservation between persons

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[4] By contrast, the Solicitor of the Interior concluded in 1978 that, even after *Oliphant,* federal jurisdiction over offenses by non-Indians against Indians remains exclusive. 5 Indian L. Rep. H-10 (1978).

who are not Indians, the laws and courts of the United States, *rather than those of Arizona,* have jurisdiction over offenses committed there, as in this case, by one who is not an Indian against one who is an Indian" (*id.* at 714 (emphasis added)).

In *Williams* v. *Lee, supra,* the Court held that an Arizona court did not have jurisdiction over a civil suit brought by a non-Indian against an Indian arising out of a transaction occurring on the Navajo Reservation, because the exercise of state jurisdiction would undermine the authority of the tribal courts. After discussing jurisdictional principles governing Indian reservations generally (358 U.S. at 218-221) and observing that "state courts have been allowed to try non-Indians who committed crimes against each other on a reservation," the Court stated that "if the crime was by or *against an Indian,* tribal jurisdiction or that expressly conferred on other courts by Congress has remained exclusive" (*id.* at 220 (emphasis added)). As a result, the Court noted, "non-Indians committing crimes against Indians are now generally tried in federal courts" (*id.* at 220 n.5).

The Court made a similar comment in *Washington* v. *Confederated Bands & Tribes of the Yakima Indian Nation,* 439 U.S. 463 (1979), in which it upheld the manner in which Washington assumed jurisdiction over Indians and Indian territory pursuant to Public Law 280. The Court observed that before the State assumed jurisdiction, its law reached into Indian reservations only if it did not infringe on tribal self-government. "As a practical matter," the Court explained, "this * * * meant that criminal offenses by or *against Indians* [had] been subject only to federal or tribal laws * * * except where Congress * * * 'expressly provided that State laws shall apply.' " 439 U.S. at 470-471 (emphasis added), quoting *McClanahan* v. *Arizona State Tax Comm'n,* 411 U.S. 164, 170-171 (1973).[5] See also 439

[5] The Court could have suggested in *Yakima Nation* that state jurisdiction over crimes by non-Indians against Indians would not interfere with the right of the Indians to make their own laws and be governed by them, since *Oliphant* had held only ten months earlier that a Tribe cannot exercise criminal jurisdiction over non-Indians. Nevertheless, in *Oliphant* itself, the Court appeared to regard federal jurisdiction over crimes committed by non-Indians

U.S. at 498-499 (by virtue of Washington's partial assumption, "[s]tate jurisdiction is complete as to all non-Indians on reservations").

The statements in these three decisions were dicta, but they cannot be dismissed as mere casual asides. In *Williams* v. *United States* and *Williams* v. *Lee,* they were the product of a thorough and considered review of jurisdictional principles in Indian country. See 327 U.S. at 714-715 n.10; 358 U.S. at 219-222. And in *Yakima Nation,* the Court's observation set the stage for a discussion of Public Law 280, which authorized the States to *assume* jurisdiction over offenses "by or against Indians" in Indian country—an enactment that alone suggests that the States do not have such jurisdiction in the absence of express authorization by Congress. See pages 13-17, *infra.*

b. The view expressed by this Court in the two *Williams* cases and *Yakima Nation* finds some support in the origins and history of Section 1152. Section 1152 was enacted as Section 25 of the Trade and Intercourse Act of 1834, ch. 161, 4 Stat. 733. See *New York ex rel. Ray* v. *Martin,* 326 U.S. at 500 n.6. At that time, this Court's then-recent decision in *Worcester* v. *Georgia,* 31 U.S. (6 Pet.) 515 (1832), "reflected the view that Indian Tribes were wholly distinct nations within whose boundaries 'the laws of [a State] can have no force.' " *New Mexico* v. *Mescalero Apache Tribe,* 462 U.S. 324, 331 (1983), quoting 31 U.S. (6 Pet.) at 561. As a result, the Congress that enacted what is now 18 U.S.C. 1152 no doubt assumed that it occupied the entire field of criminal law enforcement in Indian country (ex-

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as exclusive. Thus, after discussing certain Acts of Congress, including the second paragraph of 18 U.S.C. 1152 (see 435 U.S. at 203), the Court stated (435 U.S. at 204-205, quoting *In re Mayfield,* 141 U.S. 107, 116 (1891)):

> The "general object" of the congressional statutes was to allow Indian nations criminal "jurisdiction of all controversies between Indians, or where a member of the nation is the only party to the proceeding, and to reserve to the courts of the United States jurisdiction of all actions to which its own citizens are parties on either side."
>
> * * * Indian tribal courts are without inherent jurisdiction to try non-Indians, and must depend on the Federal Government for protection from intruders.

cept for that undertaken by the Tribes), and that the States therefore did not have concurrent jurisdiction over reservations within their borders.

That inference is reinforced by Congress's decision to apply to Indian country the laws of the United States that apply to crimes committed within the "sole and exclusive jurisdiction of the United States" (4 Stat. 733). The quoted phrase suggests that Congress contemplated a parallel between Indian country and the federal enclaves over which Congress may "exercise exclusive Legislation" (U.S. Const. Art. I, § 8, Cl. 17). Because state criminal laws were inapplicable in such enclaves, the text of Section 1152 suggests that Congress intended those laws to be inapplicable in Indian country as well.[6]

Although this Court subsequently held in *McBratney* that a State has jurisdiction over crimes committed by non-Indians against non-Indians, *McBratney* does not support Arizona's argument here. The basis of the holding in *McBratney* was not that 18 U.S.C. 1152 remained applicable and that the State had concurrent jurisdiction over those crimes, as Arizona argues. Rather, the Court held that the Act admitting Colorado to the Union implicitly *repealed* 18 U.S.C. 1152 as applied to crimes involving only non-Indians, and that the State acquired jurisdiction as a result of that repeal. 104 U.S. at 623-624. That reasoning suggests that where, as here, Section 1152 has *not* been repealed, federal jurisdiction remains exclusive.

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[6] Only after *James* v. *Dravo Contracting Co.*, 302 U.S. 134, 147-149 (1937), was it evident that a state legislature's consent to the purchase of property by the United States could be conditioned on the State's retention of concurrent jurisdiction. In response to *Dravo*, Congress in 1940 amended the definition of the special territorial and maritime jurisdiction of the United States, now codified in 18 U.S.C. 7(3), to refer to "lands reserved or acquired for the use of the United States, and under the exclusive *or concurrent* jurisdiction thereof" (emphasis added). Act of June 11, 1940, ch. 323, 54 Stat. 304; see H.R. Rep. No. 1623, 76th Cong., 3d Sess. (1940); S. Rep. No. 1708, 76th Cong., 3d Sess. (1940). Since *Dravo*, concurrent state and federal jurisdiction over a particular tract has been a matter for negotiation between the two sovereigns. See 40 U.S.C. 255. Public Law 280 instituted a similar regime by which jurisdiction over crimes "by or against Indians" is subject to adjustment among the United States, the States, and the Tribes. See page 18, *infra*.

This reading of *McBratney* also is more consistent with principles that historically have governed jurisdiction in Indian country. The Framers of the Constitution intended that relations between Indians and non-Indians would be regulated by the United States, to the exclusion of the States, and Congress has consistently acted on that premise. *County of Oneida* v. *Oneida Indian Nation,* 470 U.S. 226, 234-235 & n.4 (1985). Congress reasonably could conclude that because offenses committed by non-Indians against other non-Indians in Indian country do not directly involve relations with the Indians, jurisdiction could be transferred to the States without undermining this principle of exclusive federal control. By contrast, criminal offenses "by or against Indians" directly implicate relations between Indians and non-Indians, which traditionally have been the subject of federal, not state, concern.

Finally, contrary to Arizona's contention (Pet. 21-23), this Court in *Williams* v. *United States* reasonably relied on *Donnelly* for the proposition that Arizona did not have jurisdiction over offenses committed by non-Indians against Indians on an Indian reservation. The Court in *Donnelly* rejected the contention that, under the *McBratney* rationale, the admission of California to the Union gave the States undivided authority to punish crimes, except those committed by Indians. The Court described *McBratney* as holding, in effect, that the "admission of States qualified the former Federal jurisdiction over Indian country included therein by withdrawing from the United States *and* conferring upon the State the control of offenses committed by white people against whites, in the absence of some law or treaty to the contrary" (228 U.S. at 271 (emphasis added)). The Court held, however, that crimes committed "by or against Indians" are "not within the principle of * * * *McBratney*" (*ibid.*). The Court thus viewed the *McBratney* "principle" as having two aspects—the repeal of federal jurisdiction under what is now 18 U.S.C. 1152 and the concomitant vesting of jurisdiction in the State—and evidently believed that both aspects were inapplicable in *Donnelly*. This reading of *Donnelly* is reinforced by the fact that the Executive Branch

took the position in *Donnelly* that California did not have jurisdiction over the offense. According to the official report of the oral argument, counsel for the United States contended that although *McBratney* left open the question of jurisdiction over crimes "by or against Indians," such crimes, "being a part of the intercourse between the two races, are fundamentally within the scope of regulation by Congress *rather than by the States*" (228 U.S. at 249 (emphasis added)). The same view was expressed in the government's brief in *Donnelly*.[7] Cf. *United States* v. *Ramsey*, 271 U.S. 467, 469 (1926); *United States* v. *Chavez*, 290 U.S. 357 (1933).

4. The text and background of Public Law 280 lend some support to the conclusion that the States are without jurisdiction over offenses committed by non-Indians against Indians in the absence of affirmative authorization by Congress.

a. Section 2 of Public Law 280 (67 Stat. 588-589) enacted 18 U.S.C. 1162, which is entitled "State jurisdiction over offenses committed by or *against Indians* in Indian country" (emphasis added). Subsection (a) of Section 1162 now provides that the listed States (which do not include Arizona)[8] "shall have jurisdiction over offenses committed by or *against Indians* in the areas of Indian country listed opposite the name of the State to the same extent that such State has jurisdiction over offenses committed elsewhere within the State, and the criminal laws of

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[7] See U.S. Br. at 14-15: "The same hostility of the local whites, which * * * was noticed in the *Kagama* and other cases cited, opposes an implication that the creation of State governments has implied a repeal of the Federal laws as affecting crimes by whites against Indians, or *vice versa*, and a delegation to the local State governments of the control of these particular interrelations between their citizens and the whites." See also U.S. Br. at 6-7. The United States similarly took the position in *Antelope* (see U.S. Br. at 9, 15, 17, 19-20, 26, 29 n.13, 30 n.14, 31, 41, 42-45) and *Yakima Nation* (see U.S. Br. at 4, 18 & App. B, Chart 2, Cases 11-20) that federal jurisdiction over crimes by non-Indians against Indians is exclusive.

[8] The States listed in 18 U.S.C. 1162(a) as originally enacted were California, Minnesota (except the Red Lake Reservation), Nebraska, Oregon (except the Warm Springs Reservation), and Wisconsin (except the Menominee Reservation). Subsequent amendments have added Alaska (with one exception) and deleted the exception for the Menominee Reservation.

such State shall have the same force and effect within such Indian country as they have elsewhere within such State" (emphasis added).[9] The clear import of the title and text of Section 1162(a) is that it comprehensively regulates the subject identified in its title (compare *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 109 S. Ct. 683, 687-688 (1989)) and constitutes the only general authorization for the States to exercise criminal jurisdiction over offenses committed "by or against Indians" in Indian country. *Three Affiliated Tribes II*, 476 U.S. at 884. Indeed, if the States already had jurisdiction over crimes by non-Indians against Indians, as Arizona argues, the reference in Section 1162(a) to offenses "against Indians" would have been superfluous: that phrase was not necessary to confer jurisdiction over offenses committed against Indians by other Indians, because such jurisdiction was conferred by the reference to offenses committed "by * * * Indians."

The conclusion that the States listed in Section 1162(a) did not already have jurisdiction over offenses by non-Indians "against Indians" is reinforced by the title of Public Law 280 as a whole: an Act "To *confer* jurisdiction on the States * * * with respect to criminal offenses and civil causes of action committed or arising on Indian reservations within such States, and for other purposes." 67 Stat. 588 (emphasis added). This inference is further reinforced by Section 6 of Public Law 280, which authorized non-listed States, such as Arizona, to amend their constitutions or statutes to remove any legal impediments to the "assumption" of jurisdiction; and by Section 7, which granted the consent of the United States to any State "not having jurisdiction" to "assume" jurisdiction by legislative action. 67 Stat. 590. Cf. *Three Affiliated Tribes I*, 467 U.S. at 150-151. As the court below observed (Pet. App. A18-A19), Arizona did not assume jurisdiction over the Navajo Reservation under Public Law 280, and it cannot do so now without the consent of the Tribe. 25 U.S.C. 1321(a). The text of Public Law 280 therefore

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[9] Subsection (c) of 18 U.S.C. 1162 provides that 18 U.S.C. 1152 and 1153 "shall not be applicable" within the areas of Indian country listed in subsection (a).

indicates that Arizona does not have jurisdiction over offenses committed "against Indians" by non-Indians on that Reservation.

b. The events preceding the enactment of Public Law 280 confirm this interpretation of the statutory text. The immediate legislative history of Public Law 280 is limited (see *Yakima Nation*, 439 U.S. at 488-493 & n.38) and focuses primarily on state jurisdiction over the Indians themselves.[10] However, Public Law 280 was the culmination of more than a decade of consideration of extending state jurisdiction onto Indian reservations, including the enactment of several measures that did so in particular States. The relevant materials reveal a consistent view on the part of Congress and the Executive Branch during this period that, in the absence of express authorization, the States did not have jurisdiction over offenses "by or against Indians."

For example, in 1948 the House passed a bill,[11] which was also reported to the Senate, that served as a model for Public Law 280. The committee reports on that bill both stated that "under the present law the States have no jurisdiction to enforce laws designed to protect the Indians from crimes perpetrated by or against Indians." S. Rep. No. 1142, 80th Cong., 2d Sess. 2 (1948); H.R. Rep. No. 1506, 80th Cong., 2d Sess. 1 (1948). The same view was expressed in the legislative history of the 1948 Acts that conferred criminal jurisdiction on New York and Iowa over crimes "by or against Indians" on reservations.[12] Similarly,

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[10] See generally H.R. Rep. No. 848, 83d Cong., 1st Sess. (1953); S. Rep. No. 699, 83d Cong., 1st Sess. (1953); *Hearings on H.R. 1063 Before the Subcomm. on Indian Affairs of the House Comm. on Interior and Insular Affairs*, 83d Cong., 1st Sess. (June 29, 1953) (unpublished); *Hearings on H.R. 1063 Before the House Comm. on Interior and Insular Affairs*, 83d Cong., 1st Sess. (July 15, 1953) (unpublished); *State Legal Jurisdiction in Indian Country: Hearings on H.R. 459, H.R. 3235 and H.R. 3624 Before the Subcomm. on Indian Affairs of the House Comm. on Interior and Insular Affairs*, 82d Cong., 2d Sess. (1952).

[11] H.R. 4725, 80th Cong., 1st Sess. (1947); see 94 Cong. Rec. 2854-2855 (1948).

[12] For New York (Act of July 2, 1948, ch. 809, 62 Stat. 1224, 25 U.S.C. 232), see H.R. Rep. No. 2355, 80th Cong., 2d Sess. 1 (1948); see also *id.* at 4

the committee reports on the 1940 Act in which Congress conferred concurrent jurisdiction on the State of Kansas over crimes "by or against Indians" (Act of June 8, 1940, ch. 276, 54 Stat. 249, 18 U.S.C. 3243) reproduce a letter from the Acting Secretary of the Interior, which states that "the authority of the several States over wrongful or illicit acts committed upon tribal or restricted Indian lands extends in the main only to situations where both the offender and the victim are white men." H.R. Rep. No. 1523, 76th Cong., 3d Sess. 2 (1940); H.R. Rep. No. 1999, 76th Cong., 3d Sess. 2 (1940).[13] Finally, Felix Cohen's *Handbook of Federal Indian Law,* which was published by the Department of the Interior in 1942, stated (at 120) that "[w]ith respect to all offenses committed by whites against Indians on an Indian reservation, state jurisdiction yields to federal jurisdiction, although in fact the Federal Government has adopted state laws in providing for the punishment of such offenses by the federal courts."[14] See also *id.* at 146.

c. This view of the limited reach of state jurisdiction is also reflected in the legislative history of the Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 73, in which Congress repealed Section 7 of Public Law 280 and provided instead that States "not having jurisdiction" over offenses committed "by or against Indians" may "assume" such jurisdiction only with the

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(letter from Oscar L. Chapman, Under Secretary of the Interior, to Chairman Butler of the Senate Committee on Interior and Insular Affairs) ("The State already has jurisdiction over offenses committed on Indian reservations in cases not involving Indians or Indian property."); see also S. Rep. No. 1489, 80th Cong., 2d Sess. (1948). For Iowa (Act of June 30, 1948, ch. 759, 62 Stat. 1161), see H.R. Rep. No. 2356, 80th Cong., 2d Sess. 1 (1948).

[13] See also H.R. Rep. No. 2161, 82d Cong., 2d Sess. 4 (1952) (letter from Acting Assistant Secretary of the Interior White to Chairman Murdock of the House Committee on Interior and Insular Affairs concerning a bill to confer jurisdiction on California) ("Except for the Agua Caliente Reservation, the United States district court is the only tribunal that has jurisdiction over offenses committed on Indian reservations by or against Indians.").

[14] The *Handbook* stated in a footnote (at 120 n.53, citing the injunctive action in *New York* v. *Dibble* (see note 2, *supra*)), that "[t]here may be situations * * * in which a concurrent jurisdiction may be exercised by the state to protect Indians against non-Indians."

consent of the Tribe concerned. §§ 401(a), 403(b), 82 Stat. 78, 79, 25 U.S.C. 1321(a), 1323(b). In a letter to the Chairman of the House Committee addressing the tribal consent provision, Deputy Attorney General Christopher stated that "[i]n general, States at the present time do not have jurisdiction over criminal offenses committed on Indian reservations by or against Indians," and that Public Law 280 creates an exception to that general rule. *Rights of Members of Indian Tribes: Hearing on H.R. 15419 and Related Bills Before the Subcomm. on Indian Affairs of the House Comm. on Interior and Insular Affairs*, 90th Cong., 2d Sess. 27 (1968).[15]

5. It is not without significance that Congress's enactment of the statutory provisions just discussed alternated with this Court's pronouncements that the States are without jurisdiction over offenses "by or against Indians" in the absence of express congressional authorization. Thus: (1) Congress enacted the 1940 Act conferring jurisdiction on Kansas on the understanding that the State was otherwise without jurisdiction over such offenses; (2) this Court expressed the same view in *Williams* v. *United States* in 1946; (3) Congress then acted on that premise when it passed the special statutes for New York and Iowa in 1948 and Public Law 280 in 1953; (4) this Court reiterated the rule of *Williams* v. *United States* in *Williams* v. *Lee* in 1959; (5) Congress amended Public Law 280 in 1968, after receiving a submission from the Deputy Attorney General stating that the States are without jurisdiction over crimes committed by or against Indians in Indian country; and (6) this Court again reiterated that view in *Yakima Nation* in 1979.

Whatever once might have been the merits of Arizona's argument for concurrent jurisdiction—and, as explained above, the origins of Section 1152 and the rationale of *McBratney* and

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[15] The legislative history of the 1976 amendments to the Major Crimes Act, 18 U.S.C. 1153 (see Indian Crimes Act of 1976, Pub. L. No. 94-297, § 2, 90 Stat. 585), which were designed to eliminate discrimination between Indians charged under that Act and non-Indians charged under 18 U.S.C. 1152, also indicates that Congress believed federal jurisdiction under Section 1152 was exclusive. See H.R. Rep. No. 1038, 94th Cong., 2d Sess. 2 (1976); 122 Cong. Rec. 14,290 (1976) (remarks of Rep. Hungate).

Donnelly cast doubt on that position as an original matter—the pattern of this Court's pronouncements and Congress's actions since 1940 suggest that the Court need not revisit this jurisdictional issue unless there are substantial reasons for doing so. We do not believe those reasons are present in this case.

First, Public Law 280 and the 1968 amendments thereto establish a comprehensive regime under which Arizona may assume jurisdiction over offenses committed against Indians, albeit with the Tribes' consent. Because Congress chose to condition the assumption of jurisdiction on the basis of positive action by the State (see *Yakima Nation*, 439 U.S. at 485-495) and a formal decision by the Tribe to bring Indians under state protection, the Court may properly hesitate before accomplishing the same result by a judicial construction that departs from prior understandings.

Second, the conclusion by the Arizona Court of Appeals in this case is consistent with the holdings of the courts of North Dakota, Montana, and Oklahoma that those States are without jurisdiction over offenses committed by non-Indians against Indians in Indian country. See *State* v. *Burnett*, 671 P.2d 1165 (Okla. Crim. App. 1983); *State* v. *Greenwalt*, 204 Mont. 196, 663 P.2d 1178 (1983); *State* v. *Kuntz*, 66 N.W.2d 531 (N.D. 1954); see also *State* v. *Youpee*, 103 Mont. 86, 94, 61 P.2d 832, 835 (1936) (dictum). The Supreme Courts of New Mexico and Minnesota have expressed the same view in dicta. See *State* v. *Warner*, 71 N.M. 418, 421-422, 379 P.2d 66, 68-69 (1963); *State* v. *Jackson*, 218 Minn. 429, 431, 16 N.W.2d 752, 754 (1944); see also 30 Op. Ore. Att'y Gen. 11 (1960). The view this Court adopted in the two *Williams* cases and *Yakima Nation* thus has been widely accepted in the States.[16]

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[16] That acceptance, we hasten to add, has not been universal. In *State* v. *McAlhaney*, 220 N.C. 387, 17 S.E.2d 352 (1941), the Supreme Court of North Carolina held that the State had jurisdiction over an offense by a non-Indian against an Indian on the Eastern Cherokee Reservation. However, *McAlhaney* was decided before this Court's decision in *Williams* v. *United States* and the enactment of Public Law 280. Moreover, the decision in *McAlhaney* appears to have been largely influenced by the North Carolina Supreme Court's view of the distinct history of the Eastern Cherokee Indians, including its belief that the State had jurisdiction over the Indians themselves. See *Jackson County* v.

Third, respondent has pleaded guilty in federal court to the offense of sexual conduct with a minor based on an incident involving one of the children involved in the state charges, and he was sentenced by the federal court to 20 years' imprisonment. Because respondent was prosecuted under the Assimilative Crimes Act based on a violation of Arizona law, the State's interest in assuring that its criminal laws are enforced against its non-Indian citizens has been vindicated in this case. Moreover, the instant prosecution is inconsistent with the recitation in the respondent's federal plea agreement, in which it was represented that the State would not prosecute him on the charges then pending against him. This is therefore not a case in which the public interest in the full and fair enforcement of the criminal laws has been frustrated by the absence of concurrent state jurisdiction over respondent's crimes.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Swayney, 319 N.C. 52, 57-58, 352 S.E.2d 413, 416-417, cert. denied, 484 U.S. 826 (1987); *Wildcatt* v. *Smith*, 69 N.C. App. 1, 10-11 n.16, 316 S.E.2d 870, 877 n.16 (1984). For these reasons, we are not persuaded that the nearly 50-year-old decision in *McAlhaney* gives rise to a live conflict warranting review by this Court.

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NO. 88-603

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

STATE OF ARIZONA,

Petitioner,

-vs-

CONRAD MARION FLINT,

Respondent,

ON WRIT OF CERTIORARI TO THE
ARIZONA COURT OF APPEALS

SUPPLEMENTAL BRIEF IN REPLY TO AMICUS BRIEF

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ARGUMENT FOR GRANTING THE WRIT

1. THE STATUS QUO

In the amicus brief, the Government correctly states that "Federal investigative agents, prosecutors, and courts often are much farther from the scene of an on-reservation crime than are their state and local counterparts." (Amicus Brief at 6-7.) This distance imposes a severe burden on victims, witnesses, and the entire judicial process. This problem, and others, raise the question of the adequacy of the federal response to reservation crimes committed by non-Indians against Indians. U.S. Comm'n on Civil Rights, Indian Tribes: A Continuing Quest for Survival 175-76 (1981). The case before the court is a prime example of the problems facing the Indian tribes under the status quo.

Flint, a non-Indian, was a licensed school teacher with the State of Arizona, and was employed by the Kayenta School District. The Kayenta School District is authorized and funded by the State of Arizona. The Kayenta

School District leased property from the Navajo Nation to provide education to the Indian children. Flint met and developed contacts with various Indian boys through his position as a teacher with Kayenta. Flint invited Indian boys to his apartment where he molested them. Flint's apartment was located on the land leased by Kayenta. Arizona authorities were notified of Flint's activities. Arizona seized, pursuant to a warranted search of Flint's apartment, 2,000 to 3,000 photographs and slides and 29 VHS tapes depicting various sexual encounters between Flint and his victims. The Arizona prosecuting agency investigating the allegations notified the United States Attorney's Office in Phoenix of the situation. Pursuant to the United States Attorney's Manual § 9-20.215 (1985)[1], the

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1. See also Policy Concerning State Jurisdiction over certain offenses on Indian Reservations. Addendum to United States Attorney's Manual § 9-20.215 dated February 11 1986.

federal government declined to handle the case until after Arizona finished with its state prosecution. On August 7, 1986, the Arizona trial court dismissed the state charges and ordered that Flint be released from state custody. Arizona immediately notified the United States Attorney's Office of the trial court's decision, and insisted that the federal government take action. Then, and only then, did the federal government begin any action against Flint.[2]

The federal government concedes in the amicus brief that Arizona has a strong

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2. The Government makes much of the fact that Flint was subsequently prosecuted by the United States Attorney's office after the charges were dismissed by the Arizona court. What is curious by its absence is the fact that Arizona agreed to drop its prosecution of Flint if the United States Attorney would agree to give Flint the same plea offer made by Arizona in state court. The United States Attorney's office refused to do so, and agreed to a lesser disposition with Flint. The irony of this case is that the only official elected by the Indians to review this case, the Arizona County Attorney, would be precluded from determining if the Indian's interest was adequately protected if the amicus position was accepted by this Court and certiorari denied.

interest in enforcing its criminal laws against non-Indians who commit crimes against children of its Indian citizens[3], and that the exercise of state jurisdiction would not interfere with the federal or tribal interests.[4] (Amicus Brief at 3.) The Government likewise states that concurrent jurisdiction is commendable as a matter of public policy.[5] (Id. at 5.) Finally, the amicus brief notes that because of these concerns it has been the official United States position for nearly 10 years that the states do have concurrent jurisdiction with

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3. This court has specifically noted the particular and compelling state interest in prosecuting those individuals who commit crimes against children. New York v. Ferber, 458 U.S. 747 (1982).

4. See also Rothe v. United States, 354 U.S. 476, 493-94 (1957) (concurrent state action is not preempted unless it interferes with or burdens the federal function).

5. See also Smith v. United States, 431 U.S. 291, 306 (1977) (concurrent prosecuting jurisdiction encouraged as the resources of any one agency should go to that area deemed to have the greatest priority).

the federal government to prosecute crimes committed by non-Indians against Indians in Indian Country. (Id. at 7-8.) The Amicus then states that the Government's official position has now changed because of this Court's request for the views of the United States. (Id. at 8.)

The fact that the Government has many different official positions on this issue underscores the Civil Rights Commission's report on the failure of the federal response to reservation crimes. Likewise, the old official position is precisely the reason the instant case was initially brought in state court. The instant case underscores the inadequacies of allowing the federal government to have exclusive jurisdiction to prosecute these types of cases when the states are better equipped to handle the cases, and have just as strong an interest in seeing that the non-Indian perpetrators be brought to justice. Contrary to the amicus' position,

the status quo is not acceptable and warrants this Court's time in reviewing the instant case.

2. THE ISSUE OF WHETHER THE STATES HAVE CONCURRENT JURISDICTION TO PROSECUTE CRIMES COMMITTED IN INDIAN COUNTRY BY NON-INDIANS, HAS NEVER BEEN DECIDED BY THIS COURT AND WILL CONTINUE TO BE THE SUBJECT OF OFFICIAL FEDERAL POSITIONS AND DEBATE UNTIL THIS COURT RULES ON THE MERITS OF THE CLAIM.

In the amicus brief, the Government recognizes that the issue presented by the Petition is "difficult." (Amicus Brief at 8.) The Government also recognizes that this Court has yet to rule on the merits of the claim. (Id. at 3.) The Government recommends that this Court deny the Petition because the congressional and executive branches of government have relied on dicta from this court indicating that the federal jurisdiction is exclusive. (Amicus Brief at 3.) The Government position is in error.

From the discussion above, it is clear that the executive branch has not relied on this Court's dicta in formulating its Indian jurisdiction policy. See United States

Attorney Manual § 9-20.215 (1985). For the last 10 years, the official position of the United States government has been that this Court had not ruled on the issue, and the better policy was to allow the states to exercise what was believed to be their concurrent jurisdiction first. Id. The instant case arose in state court because of the Government's position. Clearly, there has been no reliance by the executive branch on this Court's dicta.

Likewise, the argument that the legislative branch has relied on language from this Court in formulating legislation is not persuasive. In Blue Jacket v. Board of Commissioners of the County of Johnson (Kansas Indian Case), 72 U.S. (5 Wall.) 667 (1867), this Court found that the Kansas treaty specifically excluded state jurisdiction to prosecute non-Indians. After this Court held that the treaty and acts of Congress excluded crimes committed against Kansas Indians by non-Indians from the jurisdiction of the Kansas courts, Congress

enacted legislation conferring on Kansas concurrent jurisdiction over criminal acts committed by non-Indians against Indians. 18 U.S.C. § 3243. By conferring concurrent criminal jurisdiction on Kansas, Congress did nothing more than place Kansas in the same position as that enjoyed by all states. The only other legislation pointed to by the amicus as indicative of Congressional intent is Public Law 83-280. (Amicus Brief at 13.) The amicus claims that Congress must have intended to preclude state jurisdiction or it would have been unnecessary to provide that state jurisdiction could be extended to "offenses committed by or against Indians," since "by" alone would have been effective to divest the United States of exclusive jurisdiction of the Major Crimes Act. (Id. at 13-14.) What the amicus' argument overlooks is that the tribal courts have exclusive jurisdiction over offenses not enumerated in the Major Crimes Act committed by Indians "against" Indians. 18 U.S.C. § 1152.2; Ex

Parte Crow Dog, 109 U.S. 556 (1983). Public Law 83-280 was designed not only to allow for the shift of federal responsibility for major crimes to the states, but also to have the states undertake responsibility for the minor offenses that the tribes were unable to deal with effectively. Washington v. Confederated Bands and Tribes of Yakima Indian Nation, 439 U.S. 463, 471, 488 n.32, 489 n.33 (1979). It was the minor crimes, not those committed by non-Indians, that required use of the word "against." There is no evidence of Congressional reliance on this Court's dicta.

CONCLUSION

The denial of certiorari will forever preclude this Court from reviewing and addressing the merits of petitioner's claim. Arizona believes that the dicta of this Court in previous cases should not be the basis for divesting the state of its authority to monitor and protect the interests of its

Indian citizens. Arizona prays this Court will grant the Petition and settle this issue on the merits.

DATED this 10th day of June, 1989.

Respectfully submitted,

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Attorneys for PETITIONERS

A F F I D A V I T

STATE OF ARIZONA)
) ss.
COUNTY OF MARICOPA)

PAUL J. McMURDIE, a member of the Bar of this Court, being duly sworn upon oath, deposes and says:

That he served three copies of the Supplemental Brief in Reply to Amicus Brief upon Jon Sands, Federal Public Defender, 3020 North Central, Suite 200, Phoenix, Arizona, 85004, Attorney for Conrad Marion Flint, by depositing the same in the United States Mail, with first class postage prepaid, return receipt requested.

DATED this 19th day of June, 1988.

PAUL J. McMURDIE
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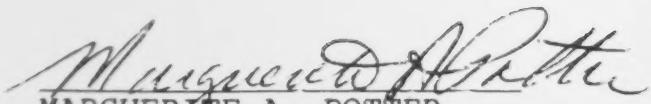
SUBSCRIBED AND SWORN to before me

this 19th day of June, 1989.



MARGUERITE A. POTTER
NOTARY PUBLIC

My Commission Expires:

September 22, 1989

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